COMPETITION
AND PUBLIC PROCUREMENT
With Special Focus on Pro-competitive and
Anti-competitive Information Exchange as well as the
New Competition Principle of the
New EU Public Procurement Directives

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Theses and books that have inspired me

In 1969, one of my current supervisors, Ulf Bernitz, presented his doctoral thesis on “Marknadsrätt”, where he compared Swedish competition law to EU competition law as well as to English, German and French competition law. To my knowledge, Ulf

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2 This section presents a number of theses and books which have inspired me in various ways without being closely related to the subject of my licentiate thesis. Those theses and books which have inspired me and are closely related to the subject of my thesis are presented in section 1.4.2 below.
Bernitz's thesis is the first doctoral thesis on EU competition law presented at a Swedish University. It provided me with a valuable historical background to both Swedish and EU competition law.

In 1977, my first supervisor, Hans Henrik Lidgard, presented his doctoral thesis on 'Sverige – EEC och konkurrensen, Aspekter på Sveriges frihandelsavtal med EEC med särskild tonvikt på avtalets konkurrensregler'. The doctoral thesis of Hans Henrik Lidgard, who now is a Professor of Law at the University of Lund and was my first supervisor, was written at a time when few people in Sweden expected the country ever to become a member of the EU. To my knowledge, Hans Henrik's dissertation is the second doctoral thesis on EU competition law presented at a Swedish University. The thesis has inspired me in several ways, of which I would like to mention the following.

To my knowledge, Hans Henrik's thesis is the first Swedish thesis analysing the relationship between EU competition law and intellectual property rights. This was an interesting topic 39 years ago and is even more so today. One of the aspects I cover in my thesis is the relationship between competition and another field of law, public procurement law, which is also a relationship of growing practical significance.

In February 1993, one of my current supervisors, Mats Bergman, published his doctoral thesis in Economics on 'Market Structure and Market Power - The Case of the Swedish Forest' at the University of Umeå. Mats Bergman is now a Professor of Economics at the Södertörn University in Stockholm. Just like my first supervisor Hans Henrik Lidgard, Mats Bergman chose to write a compilation thesis. In 2011 Mats Bergman co-authored a book on 'Offentlig upphandling - På rätt sätt och till rätt pris', which to my knowledge is the first Swedish book on public procurement law where the economic aspects related to public procurement are presented in a comprehensive way. Back in

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3 Bergman, Mats; Indén, Tobias; Lundberg, Sofía and Madell, Tom, Offentlig upphandling - På rätt sätt och till rätt pris (Lund, Studentlitteratur, 2011).
2006, Mats wrote the introduction to the conference book concerning the Pros and Cons of Information Sharing conference organised by the Swedish Competition Authority.\textsuperscript{6} At that time, Mats Bergman was chief economist at the Swedish Competition Authority which I had joined in early 2006. In that function, Mats provided valuable guidance in a number of cases concerning anti-competitive information exchange in which I was involved during my five years at the Swedish Competition Authority.

In September 2001, Arvid Fredenberg presented his doctoral thesis in Economics on ‘Market Transparency’\textsuperscript{7}; which analyses market transparency and competition from an economic perspective. Back in 1994, Arvid and I had worked through the last undergraduate courses in economics at the Stockholm School of Economics with great result, together with Rickard Eriksson, Martin Flodén, Mattias Danielsson as well as Olof Runborg. All of these fellow students later engaged in doctoral studies in Economics or Mathematics. While all of them inspired me to engage in doctoral studies – even though only many years later and in law instead of economics – Arvid Fredenberg’s thesis inspired me also as to the choice of subject. Arvid’s thesis dealt with economic aspects of information exchange related to the artificial increase of market transparency created by information exchange. I decided to write a thesis on market transparency and information exchange from a legal perspective. During the five years we were colleagues at the Swedish Competition Authority from 2006-2011, I had the privilege to discuss many interesting aspects related to anti-competitive information exchange with Arvid, in his function as chief economist of the Swedish Competition Authority.

In 2001, Professor Carl Michael von Quitzow at the University of Lund published his book on ‘State Measures Distorting Free Competition in the EC’.\textsuperscript{8} I have been inspired

\begin{flushright}
\textsuperscript{6} Mats Bergman in the introduction to The Pros and Cons of Information Exchange, published by the Swedish Competition Authority in 2006.
\textsuperscript{7} Fredenberg (Nilsson), Arvid, Market Transparency, doctoral thesis presented at the Stockholm School of Economics (Stockholm, 2001).
\end{flushright}
by Carl Michael von Quitzow’s book as to the delimitations chosen in my thesis. While he analysed the effects of state measures on competition, I have chosen to analyse only such information change which is related to public procurement or otherwise initiated by public authorities.

In September 2003, my current supervisor Lars Henriksson presented his doctoral thesis on ‘Rätten till priskonkurrens – i marknadsdominans/The Right of Market Dominant Undertakings to Compete on Price’. This was the first doctoral disputation in competition law which I have attended. Lars Henriksson’s thesis inspired me to include elements of abuse of a dominant position in my thesis on information exchange. While most of my thesis concerns information exchange as anti-competitive cooperation between competitors, my first licentiate article on ‘Mandatory Supply of Interoperability Information: The Microsoft Judgment’ is about abuse of a dominant position exercised by Microsoft’s refusal to share interoperability information with its competitors.

In 2012, Andrea Sundstrand presented her thesis on ‘Offentlig upphandling – primärnärens reglering av offentliga kontrakt’ at the University of Stockholm. Her thesis is the very first doctoral thesis on public procurement law to be presented at a Swedish University and I had the opportunity to attend her mid-term and final seminars.

Finally, I would like to thank my wife Jolanta and my daughters Sofie, Julia and Marie for putting up with me during the nine challenging years I have spent writing this licentiate thesis, which is dedicated

TO MY PARENTS REINE AND MARGARET

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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AB</td>
<td>Aktiebolag, a Swedish limited liability company</td>
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<td>ARC</td>
<td>The German Act against Restrictions of Competition, Gesetz gegen Wettbewerbsbeschränkungen (GWB)</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>EC</td>
<td>European Community</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>LOU</td>
<td>Lag (2007:1091) om offentlig upphandling, the Swedish Public Procurement Act</td>
</tr>
<tr>
<td>LUF</td>
<td>Lag (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster, the Swedish Procurement Act in the Areas of Water, Energy, Transports and Postal Services</td>
</tr>
<tr>
<td>NCA</td>
<td>National Competition Authority (within the EU member states)</td>
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<td>NOU</td>
<td>Nämnden för offentlig upphandling, the former Swedish National Board for Public Procurement</td>
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<tr>
<td>OSL</td>
<td>Offentlighets- och sekretesslag, 2009:400, the Swedish Public Access to Information and Secrecy Act</td>
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<tr>
<td>R&amp;D</td>
<td>Research &amp; Development</td>
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<tr>
<td>SCA</td>
<td>Swedish Competition Authority</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>US</td>
<td>United States of America</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

ACKNOWLEDGEMENTS .......................................................................................................................... 2
LIST OF ABBREVIATIONS ...................................................................................................................... 13

1 Introduction ............................................................................................................................................... 22
  1.1 Background ......................................................................................................................................... 22
  1.2 Purpose .............................................................................................................................................. 26
  1.3 Delimitations ....................................................................................................................................... 28
  1.4 Methods, materials and outline ............................................................................................................ 29
    1.4.1 Methods ......................................................................................................................................... 29
    1.4.2 Materials ....................................................................................................................................... 30
    1.4.3 Outline .......................................................................................................................................... 32

2 Brief summaries of the first three licentiate articles .................................................................................. 35
  2.1 First licentiate article: Mandatory Supply of Interoperability Information: The Microsoft Judgment .......................................................... 35
  2.2 Second licentiate article: Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective .................................................................................. 37
  2.3 Third licentiate article: Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction ........................................................................................................... 40

3 Conclusions ................................................................................................................................................. 42
  3.1 Conclusions regarding mandatory supply of interoperability information and the Microsoft judgment .................................................................................................................. 42
  3.2 Conclusions regarding the exchange of information and opinions between European competition authorities and courts ........................................................................................................... 43
  3.3 Conclusions regarding the role of competition in public procurement law ........................................... 46
  3.4 Conclusions regarding information exchange and bid-rigging cartels ..................................................... 48
  3.5 Conclusions regarding the protection of sensitive information in public procurement proceedings .................. 48
  3.6 General conclusions and overview over further research within the future doctoral thesis .................................. 49

4 TABLE OF CASES ................................................................................................................................. 50

5 LIST OF REFERENCES ............................................................................................................................. 56
  5.1 Legislation ............................................................................................................................................ 56
  5.2 Official documents ............................................................................................................................... 57
  5.3 Articles ............................................................................................................................................... 58
  5.4 Books ............................................................................................................................................... 61
  5.5 Other publications ............................................................................................................................... 64
APPENDIX A

First article: ‘Mandatory Supply of Interoperability Information: The Microsoft Judgment’

1. Introduction A307
2. What is this case all about? The Commission’s theory of harm A308
3. Relevant legislation A309
   3.1 Article 82 EC (now Article 102 TFEU) A309
   3.2 The Software Directive A310
4. Earlier EU case law A311
   4.1 The IBM Undertaking (1984) A311
   4.2 Magill (1995) A311
   4.3 Tetra Pak II (1996) A312
   4.4 Oscar Bronner (1998) A312
   4.5 IMS Health (2004) A313
6. The facts of the EU Microsoft case A314
   6.1 The operational part of the decision as upheld by the Court of First Instance A314
   6.2 Technical and historical background A315
   6.3 To clone or not to clone: the crucial difference between implementations and specifications of protocols A316
   6.4 The two main alternative levels of interoperability set out in the Microsoft decision A317
   6.4.1 Microsoft’s Communications Protocols Licensing Program A317
   6.4.2 The Software Directive A318
7. Definition of the relevant market and finding of dominance A319
   7.1 Definition of relevant markets A319
   7.2 Finding of dominance A319
8. Is Microsoft’s interoperability information protected by intellectual property rights? A320
9. Are the criteria established in the IMS Health case law applicable to the supply of interoperability information? A321

---

10. The Court’s application of the four IMS Health conditions for abuse .......... A322
10.1 The indispensable nature of the interoperability information ...................... A322
10.2 Elimination of competition ................................................................. A323
10.3 The new product ................................................................................. A324
10.4 The absence of objective justification ..................................................... A325
10.4.1 The mere existence of intellectual property rights does not constitute any objective justification .......................................................... A325
10.4.2 The Commission did not introduce a new balancing of incentives test ...... A327

II. Analysis and conclusions........................................................................ A328
11.1 Major novelty of the judgment: the new product condition de facto replaced by a new or improved product test .................................................. A328
11.2 The truly exceptional circumstance of the case: the nature of the interoperability information ................................................................. A330
11.3 The risk of collusion by spill-over effects ................................................ A331
11.4 Is the Microsoft judgment an example of a ‘more economic approach’ to Article 102 TFEU? ................................................................. A331
11.5 Recent and future developments.............................................................. A334

APPENDIX B Second article: ‘Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective’

I. Introduction .......................................................................................... B289
A. Introduction to the EU – Framework of Regulation 1/2003 ......................... B289
B. Introduction to Swedish Competition Law Procedure –
The New Swedish Competition Act of 2008 ........................................ B291

II. The Right of National Courts to Request a Preliminary Ruling from
the Court of Justice in Competition Law Cases ........................................ B293
A. General Observations on Preliminary Rulings by the Court of Justice .......... B293
B. Swedish Courts’ Requests for a Preliminary Ruling from the European Court of Justice in Competition Law Cases ...................................... B294
i. The STIM Case .................................................................................. B294
ii. The TeliaSonera ADSL Case .............................................................. B295

III. The Right of NCAs and the Commission to Submit Amicus Curiae
Observations to National Courts in Competition Law Cases ....................... B296
A. General Points on Amicus Curiae Observations in Competition Law Cases ... B296

i. The Garage Greneau Case.................................................................B297
ii. The Case on Tax Deductibility of Commission Fines in the Netherlands......B298
iii. The Pierre Fabre Dermo-Cosmétique Case........................................B299
B. Amicus Curiae Observations Issued by the SCA to Swedish Courts in
   Competition Law Cases.......................................................................B300
i. The Soda-Club Case...........................................................................B300

IV. The Right of National Courts to Request Opinions from the Commission
    in Competition Law Cases...............................................................B301
   A. General Points on Requests of Opinions from the Commission by National
      Courts in Competition Law Cases..................................................B301
   B. Requests for Opinions from the Commission by Swedish Courts in
      Competition Law Cases................................................................B302
      i. The Ystad Harbour Case.............................................................B302
      ii. The Ektors Case........................................................................B303
   C. The Right of Swedish Courts to Request Opinions from the Swedish
      Competition Authority in Competition Law Cases............................B304
      i. The SAS v Luftfartsverket Case......................................................B305

V. The Right of National Courts to Request Information from the
   Commission in Competition Law Cases.............................................B306

VI. The Obligation of Member States to Forward National Judgments
    on EU Competition Law to the European Commission.....................B307
   A. General Points...............................................................................B307
   B. The Swedish Example: Non-Transparent Provisions..........................B308
   C. The German Example: Transparent Provisions..................................B309

VII. Why National Courts Are Not Entitled by Regulation 1/2003 to
     Request Information and Opinions from NCAs – Proposal to Consider
     Amending Regulation 1/2003 in this Respect......................................B310
   A. A Puzzling Asymmetry between Articles 15(1) and 15(3)....................B311
   B. An Overview of the Legislative History of the Coordination Measures
      Embodied in Article 15 Regulation 1/2003.......................................B311
      i. The Obligation to Forward Copies of National Judgments on
         EU Competition Law to the Commission – Article 15(2)...............B311
      ii. The Right of NCAs and the Commission to Submit Amicus Curiae
          Observations to National Courts – Article 15(3)..........................B311
      iii. The Right of National Courts to Request Information and Opinions from
           the Commission – Article 15(1)..................................................B312
   C. Analysis of the Legislative Process..................................................B313

VIII. Conclusions and Policy Proposals.....................................................B433
APPENDIX C  Third article: ‘Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction’\textsuperscript{a}

1  INTRODUCTION.................................................................................................................. C557
1.1  Purpose and Structure of this Article........................................................................... C557
1.2  Introduction to Swedish Public Procurement and Competition Law......................... C561

2  PUBLIC PROCUREMENT AND COMPETITION LAW
APPLICABLE TO ACTIONS BY TENDERERS................................................................. C563
2.1  Case Law on Public Procurement and Bid-rigging Cartels......................................... C563
2.1.1  The Aspåli Case of 2009 – Swedish Market Court....................................................... C564
2.1.2  The Power Supply Poles Case of 2009 – SCA............................................................... C564
2.1.3  The Transport of Deceased Case of 2010 – SCA........................................................ C565
2.1.4  The Burnt Waste Transport Case of 2011 – SCA......................................................... C565
2.1.5  The Tyre Case of 2010 – SCA................................................................................... C566
2.2  Proposal for Amendment of the Swedish Public Procurement
Highlighting the Unlawfulness of Joint Bids................................................................. C567
2.3  Public Procurement and Anti-competitive Information Exchange................................ C568
2.4  Public Procurement and the Protection of Sensitive Information.............................. C571
2.4.1  Swedish and EU law applicable to the protection of sensitive information
in public procurement proceedings..................................................................................... C571
2.4.1.1  The Varec Case of 2008 – CJEU............................................................................ C572
2.4.2  Swedish case law on denied access to sensitive information submitted
by competitors...................................................................................................................... C574
2.4.2.1  The Vägverket Case of 2007 – Supreme Administrative Court................................. C574
2.4.2.2  The Banverket Case of 2008 – Sundsvall Administrative Court of Appeal... C574
2.4.2.3  The Mjöby Kommun Case of 2008
– Jönköping Administrative Court of Appeal................................................................. C574
2.4.2.4  The Försorseys Materielverk Case of 2012
– Stockholm Administrative Court of Appeal............................................................... C575
2.4.2.5  The Västra AB Case of 2012
– Jönköping Administrative Court of Appeal................................................................. C575
2.4.2.6  The Skånetrafiken Case of 2012
– Göteborg Administrative Court of Appeal............................................................... C575
2.4.2.7  The Sigtuna Kommun Case of 2012
– Stockholm Administrative Court of Appeal............................................................... C576
2.4.3  Swedish case law on granted access to sensitive information submitted
by competitors...................................................................................................................... C576
2.4.3.1  The Arbetsförmedlingen Case of 2009
– Stockholm Administrative Court of Appeal............................................................... C576
2.4.3.2  The Familjebostäder Case of 2010
– Göteborg Administrative Court of Appeal............................................................... C577

\textsuperscript{a} Robert Molden’s third licentiate article on ‘Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction’ (2012) 15 Europarättslig Tidskrift 557-515, see Appendix C.
2.4.3.3 The *Västtrafik AB* Case of 2011
- Jönköping Administrative Court of Appeal ............................................. C577

2.4.4 Conclusions on Swedish case law on public procurement and the protection of business secrets ................................................................. C577

3 FRAMEWORK AGREEMENTS AND COMPETITION ASPECTS...C578
3.1 Competition Aspects of Framework Agreements under Art 32 (2) of the Classical Sector Directive .......................................................... C578
3.2 Too Long Framework Agreements .......................................................... C578
3.2.1 Swedish and EU law on too long framework agreements .................... C578
3.2.2 Swedish case law on too long framework agreements .................................... C578
3.2.2.1 The *Vaccination* Case of 2011
- Stockholm Administrative Court of Appeal ............................................. C578
3.2.2.2 The *Insurance* Case of 2011 – Karlstad Administrative Court .......... C579
3.2.2.3 The *SharePoint* Case of 2012 – Malmö Administrative Court .......... C579
3.2.3 Conclusions on the Swedish case law on too long framework agreements C580
3.3 Too Large Framework Agreements ......................................................... C580
3.3.1 Swedish and EU law on too large framework agreements .................... C580
3.3.2 Central purchasing bodies in Sweden ................................................ C581
3.4 Case Law on Too Large Framework Agreements ......................................... C583
3.4.1 The *Children Dental Care* Case of 1999 - Supreme Administrative Court C583
3.4.2 The *Nursing Home* Case of 2009
- Göteborg Administrative Court of Appeal ............................................. C583
3.4.3 The *Skåne Postal Services* Case of 2011
- Göteborg Administrative Court of Appeal ............................................. C584
3.4.4 The *SKL Kommentus Printer and Copying Machines* Case of 2012
- Legal opinion of the Swedish Competition Authority ................................ C585
3.5 Proposal to Amend the Swedish Public Procurement Act Highlighting the Duty Not to Restrict Competition, in Particular by Means of Too Large Framework Agreements ......................................................... C588

4 PUBLIC PROCUREMENT PRINCIPLES AND COMPETITION ASPECTS .................................................. C589
4.1 Competition Aspects within the Principle of Proportionality ......................... C589
4.1.1 Competition aspects on barriers to entry for newly created undertakings .............................. C589
4.1.1.1 The *Recruitment Services* Case of 2008
- Göteborg Administrative Court of Appeal ............................................. C589
4.1.1.2 The *School Transport* Case of 2009
- Göteborg Administrative Court of Appeal ............................................. C590
4.1.1.3 The *Safety Vest* Case of 2012
- Stockholm Administrative Court of Appeal ............................................. C591
4.1.2 Competition aspects concerning requirements related to a given object of a procurement proceeding C591
4.1.2.1 The *SIDA Legal Services* Case of 2012

19
4.1.3 Competition aspects concerning the object of the procurement proceeding itself.

4.1.3.1 The Suture Case of 2010 – Supreme Administrative Court

4.1.3.2 The Invisible Light Case of 2011

4.1.4 Conclusions from case law concerning competition aspects within the principle of proportionality

4.2 Competition Aspects within the Principle of Equality

4.2.1 Competitive advantages for tenderers engaged in an earlier stage of the public procurement proceeding

4.2.1.1 The Fabricom Case of 2005 – CJEU

4.2.2 The Sprinkler Case of 2010

4.2.3 The Pension Insurance Case of 2011

4.2.4 Competitive advantage to certain tenderers related to approximative size criteria

4.2.4.1 The Table-top Case of 2009 – Göteborg Administrative Court of Appeal

4.2.4.2 The Food Supply Case of 2012 – Göteborg Administrative Court

4.2.5 Conclusions from the case law concerning competition aspects within the principle of equality

4.3 The Competition Principle and The Purpose of Public Procurement Law

5 PUBLIC PROCUREMENT AND COMPETITION LAW APPLICABLE TO ACTIONS BY CONTRACTING AUTHORITIES

5.1 Why is the Control of Buyer Power Exercised by Contracting Authorities an Under-enforced Area of Competition Law

5.2 Case Law Currently Exempting Actions by Contracting Authorities from Competition Law Depending on the Subsequent Use Made of the Goods or Services (The FENIN-SELEX Case-law)

5.3 Proposal to Apply Competition Law to All Actions by Contracting Authorities Independently of the Subsequent Use Made of the Goods or Services (Reversal of The FENIN-SELEX Case-law)

5.4 Long Term Exclusive Purchase Agreements under Competition Law

5.5 Joint Purchasing/Procurement Agreements and Buyers' Cartels under Competition Law

5.6 Private Enforcement against Anti-competitive Procurement Agreements Based on Non Time-barred Voidness

6 CONCLUSIONS
APPENDIX D: FORTH LICENTIATE ARTICLE
‘This is how the Swedish Public Procurement Act should be modified in order to promote fair competition’
(2014) 1 Upphandling 24 p 7 (translated from the original Swedish language version titled ‘Så bör LOU ändras för att främja sund konkurrens’)

APPENDIX E: FIFTH LICENTIATE ARTICLE
‘The new classic EU Directive increases competition requirements’
(2014) 2 Upphandling 24 p 8 (translated from the original Swedish language version titled ‘Nytt klassiskt EU-direktiv ökar konkurrenskravet’)

APPENDIX F: SIXTH LICENTIATE ARTICLE
‘Judgment confirms EU Directive’s competition principle’
(2014) 3 Upphandling 24 p 11 (translated from the original Swedish language version titled ‘Dom bekräftar EU-direktivets konkurrensprincip’)

APPENDIX G: SEVENTH LICENTIATE ARTICLE
‘That’s how the competition principle should be implemented in the new Swedish Public Procurement Act’
(2015) 1 Upphandling 24 p 13 (translated from the original Swedish language version titled ‘Så bör konkurrensprincipen införas i nya LOU’)

APPENDIX H: EIGHTH LICENTIATE ARTICLE
‘Better Competition with Direct Effect’
Published on the Swedish on-line public procurement journal Inköpsrådet on 11 May 2016, (translated from the original Swedish language version titled ‘Bättre konkurrens med direkt effekt’, www.inkopsradet.se)

APPENDIX I: SCHEMATIC OVERVIEW OF THE LICENTIATE THESIS
1 INTRODUCTION

1.1 Background

We live in the so-called information society, which means that consumers easily can find information and compare prices of different firms using the Internet. A certain level of market transparency is necessary for price competition to occur. In fact, one of the prerequisites for effective competition is that consumers can compare prices of competing firms.

There is a widespread view among the general public that increased market transparency always leads to increased competition. However, economic research has shown that this is not always the case. Sometimes, information exchange and the resulting increase in market transparency can even lead to a restriction of competition. One explanation for this phenomenon is so-called hidden competition. If a company active on an oligopolistic market decreases its price compared to its competitors, the company can normally expect to increase its relative market share. However, when market transparency is very high, competitors will immediately follow and decrease their prices as well. This means that the original price decrease will not have any effect on the companies’ relative market shares; it will only lead to lower profitability for all of the companies. Companies will then lack any incentive for price competition.

A certain level of uncertainty and hidden competition may sometimes be necessary in order to ensure effective competition. An illustrative empiric study on the anti-competitive effects of information exchange initiated by public authorities is the Danish Ready-mixed Concrete case presented by Peter Møllgaard and Per Baltzer Overgaard at the Pros and Cons of Information Sharing conference organised by the Swedish
Competition Authority in 2006 as follows. In the beginning of the 1990s, the Danish Competition Authority received information concerning competition problems in the ready-mixed concrete industry. Persistent rumours of large individualised secret discounts were particularly disturbing. At that time, the competition legislation in Denmark prescribed improved transparency as the prime weapon against anticompetitive behaviour. Hence, the Danish Competition Authority decided to gather and publish firm-specific transaction prices for two grades of ready-mixed concrete in three regions of Denmark. By doing so, the Danish Competition Authority hoped to inform customers of bargain deals and expected them to take a tougher stand in subsequent negotiations. However, following the initial publication of this information, average prices increased by 15-20 per cent within a year in the Aarhus region. Improved transparency seemed to have led to improved coordination of the pricing policies: after a year of publication, the initial price dispersion had disappeared. Further evidence shows that average prices increased because firms stopped granting the large individualised discounts. The likely reason is that the improved transparency made deviations from the collusive agreement visible and so the firms simply stopped granting discounts. In this case the Danish Competition Authority unwittingly enabled the reliable detection of cheating which, in turn, is a prerequisite for sustaining collusion—hardly what it was aiming for. The case illustrates that if firms can react to information before it can be exploited by buyers, this can lead to buyers being harmed rather than helped by increased price transparency.

Anti-competitive information exchange between competitors constitutes an area of competition law which has been under increased scrutiny by European competition authorities during recent years. In early 2011, the European Commission published its new Guidelines on horizontal co-operation agreements containing a new chapter on information exchange between competitors. As we will see below, the issue of anti-

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44 Møllegaard, Peter and Balthzer Overgaard, Per, 'Transparency and competition policy', in Bergman, Mats (ed), The Pros and Cons of Information Exchange (Stockholm, 2006), 112-114, available on www.kkv.ac.;
competitive information exchange is particularly relevant in the area of public procurement.

From a legal perspective, anti-competitive information exchange can be divided into two categories: (i) connected information exchange and (ii) pure information exchange.

(i) Connected information exchange is information exchange which is connected, respectively auxiliary, to an overriding cartel agreement. When two or more undertakings agree on certain cartel prices, there will subsequently be strong incentives for each undertaking to charge somewhat lower prices than the agreed cartel price, in order to take some business from the other cartel members. So called cheating is thus likely to occur and without an effective monitoring device in place, most cartels would quickly erode. For example, in the Organic Peroxides cartel case, the cartel members hired a private consultancy firm – AC Treuhand – to monitor the actual prices charged by the cartel members, which ensured the cartel’s effective operation – until it was finally detected by the European Commission.36

What, then, about members of a bid-rigging cartel? To what extent do they need to hire consultancy firms or find other ways to monitor that the cartel members comply with the cartel agreement? This is not necessary. It is the contracting authority itself which actually carries out the function of cartel monitoring. This is so because in a bid-rigging cartel it is not possible for any cartel member to cheat secretly, i.e. to offer a lower price than agreed, without detection by the other cartel members. Any such attempt would fail, as tenderers in a public procurement proceeding are entitled to get information from the contracting authority on the price offered by the winning tenderer. This is one

36 The General Court described the activities of the cartel facilitator as follows: "[The cartel] was founded in 1971 by a written agreement ... between three producers of organic peroxides ... The aim of that cartel was, inter alia, to preserve the market shares of those producers and to coordinate their price increases. Meetings were held regularly to ensure the proper functioning of the cartel. Under the cartel, ..., AC-Treuhand AG, [was] entrusted ... with, inter alia, storing certain secret documents relating to the cartel, such as the 1971 agreement, on their premises; collecting and treating certain information concerning the commercial activity of the three organic peroxide producers; communicating to them the data thus treated; and completing logistical and clerical-administrative tasks associated with the organisation of meetings between those producers. ...". (Judgment of the General Court in Case T-99/04 AC-Treuhand AG v Commission, of 8 July 2008, para. 2)
reason why cartels are easier to organise and therefore probably more likely to occur in relation to public procurement proceedings than on the market in general.

(ii) *Pure information exchange* is information exchange between competitors which is anti-competitive in itself without being connected or auxiliary to an overriding cartel agreement. In its Horizontal Guidelines, the Commission makes clear that such information exchange not necessarily needs to be reciprocal, also non-reciprocal transfer of strategic information from one undertaking to another may be sufficient to trigger competition law.

An important issue is thus which kind of information can be classified as strategic. The term ‘strategic information’ is defined by the European Commission in its Horizontal Guidelines as follows:

The exchange between competitors of strategic data, that is to say, data that reduces strategic uncertainty in the market, is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition because it reduces the parties’ decision-making independence by decreasing their incentives to compete. Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition. The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.\(^\text{17}\)

In public procurement, tenderers are normally required to submit a large amount of information on the tendering undertaking as well as on the products and services offered. Some of this information may be strategic in the competition law sense set out above.

Although this thesis focuses on the adverse effects on competition of information exchange, it should from the outset be borne in mind that information exchange often

\(^{17}\) Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements [2011] OJ11/1 (The Horizontal Guidelines), para. 86.
has positive economic effects. These positive effects of information exchange have been very well summarised by Mats Bergman, then Chief Economist at the Swedish Competition Authority, in his introduction to the conference report from the Pros and Cons of Information Sharing conference organised by the Swedish Competition Authority in 2006:

In order to make the right decisions, firms need information about costs, about demand conditions and, at least from the firms' point of view, about the actions that their rivals are planning. Good information will allow the firm to plan production and marketing activities, to invest in new capacity or in R&D and to price its products competitively. Similarly, consumers will be able to make rational choices if they are well informed about different products' prices and characteristics.¹⁸

This licentiate thesis deals with two distinct aspects of positive effects of information exchange. One aspect to be analysed is the very specific situation where providing information related to interoperability in the software industry is considered to be pro-competitive to such an extent that Microsoft's refusal to supply such interoperability information was regarded as an abuse of a dominant position.¹⁹ Another specific aspect to be analysed is the exchange of information between competition authorities and courts, which may lead to more efficient and uniform application of EU competition law.²⁰

1.2 Purpose

This licentiate thesis deals with information exchange related to public procurement or otherwise initiated by public authorities. Specific aspects are analysed under Swedish/EU competition and public procurement law.

²⁰ Robert Moldn's second licentiate article on 'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective', in Basedow, Jürgen; Francq, Stéphanie and Idot, Laurence (eds), International Antitrust Litigation – Conflict of Laws and Coordination (Oxford, Hart Publishing, 2012), 289-314 and 435-434, see Appendix B.
As to the relevance of the chosen fields of law, Albert Sánchez Graells wrote the following in his excellent book on ‘Public Procurement and the EU Competition Rules’ published in 2011, which is still valid today:

The significant overlap between competition and public procurement law (i.e. the competition distortions that public procurement regulations and administrative practices can produce themselves) still remains unexplored. Generally, publicly-created distortions of competition in the field of public procurement have not yet been effectively tackled by either competition or public procurement law — probably because of the major political and governance implications embedded in our surrounding public procurement activities, which make development and enforcement of competition law and policy in this area an even more complicated issue, and sometimes muddy the analysis and normative recommendations. Notwithstanding these relevant difficulties, in our view, this is a very relevant area of competition policy to which development could bring substantial improvements and, consequently, it merits more attention than it has traditionally received.  

This licentiate thesis has two main purposes. One purpose is to analyse the law as to information exchange related to public procurement or otherwise initiated by public authorities. Here, the aim is to describe how the law is currently applied in a systematic way, i.e. applying a de lege lata perspective. The other purpose of this licentiate thesis is to propose amendments to both Swedish and EU law in order to improve the functioning of the law, i.e. applying a de lege ferenda perspective. While it is perfectly possible to write a thesis exclusively applying the de lege lata perspective, it is very difficult to write a thesis exclusively applying a de lege ferenda perspective. In order to make concrete and specific proposals for amending the law, it is first necessary to describe the law as it stands.

I have chosen to dedicate a relatively large part of the thesis to the de lege ferenda perspective. Most of the conclusions presented in the thesis therefore constitute

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proposals on how to amend the law to improve its effectiveness, alternatively how to amend Swedish law in order to make it compatible with the requirements of EU law.

One of the most interesting competition aspects of public procurement is the information exchange embodied in public procurement related to the high transparency achieved by public procurement procedures. The licentiate thesis does not limit itself to only analysing anti-competitive information exchange related to public procurement; it also looks at a number of other examples of interaction between competition law and public procurement law.22 One important aim of the licentiate thesis is to explore the role of competition within public procurement law. A general understanding of the various ways competition and public procurement law interact will hopefully facilitate the in-depth analysis of one particular way of interaction, i.e. by anti-competitive information exchange related to public procurement.

The licentiate thesis does not only analyse information exchange related to public procurement. It also analyses information exchange which is initiated by public authorities in other ways than by public procurement, such as in the Danish Readymixed Concrete case mentioned above. Here, two distinct aspects have been chosen: (i) mandatory supply of interoperability information ordered by the Court of Justice of the European Union in the Microsoft case23; and (ii) exchange of information and opinions between European competition authorities and courts under EU procedural competition law.24

1.3 Delimitations

Most infringements of competition law involve information exchange in some way or another. In order to study particularly interesting aspects of information exchange more

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22 Robert Moldén’s third licentiate article on ‘Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction’ (2012) 15 Europorättslig Tidskrift 557-615, see Appendix C.
in-depth, it is therefore necessary to define suitable delimitations regarding which aspects of information exchange to include respectively exclude from the study.

Most prior research concerning anti-competitive information exchange has been conducted as to information exchange between competing companies where the companies themselves have initiated the information exchange. The most important delimitation of this thesis is that it does not deal with this kind of information exchange. Instead, this thesis focuses on information exchange initiated by public authorities, either in relation to a public procurement proceeding or through other means.

This thesis does not have the ambition to cover all aspects of information exchange related to public procurement or otherwise initiated by public authorities. Instead, a limited number of aspects have been chosen to be studied more in-depth. Instead of writing one comprehensive monograph, I have opted for a compilation thesis, where each of the three published articles focuses on distinct aspects regarding information exchange related to public procurement or otherwise initiated by public authorities.26

1.4 Methods, materials and outline

1.4.1 Methods

The present thesis is based on a traditional legal dogmatic method. This means that the thesis focuses on analysing legal documents, in particular judgments from Swedish and EU courts.

26 In parallel with my work on the licentiate theses, I have written two Swedish national reports for the International League of Competition Law (LIDC). The first national report on “Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships” was presented at the LIDC congress in Bordeaux 2010. The second national report on “Should small and medium-sized enterprises (SMEs) be subject to other or specific competition rules” was presented at the LIDC congress in Prague 2012. Both reports can be downloaded from www.lipc.org.
Both Swedish and EU competition law prohibits agreements and concerted practices having anti-competitive objects or effects. Whether a specific agreement or a concerted practice has an anti-competitive effect can ultimately only be answered by applying an economic analysis. Within the legal field of competition law, economic analysis can thus be said to be an integrated part of the legal dogmatic method. In this sense, economic analysis is applied in this thesis. The thesis analyses Swedish and EU law, where EU law is seen as part of the Swedish legal order. The study does not make use of a full comparative law analysis. However, elements of comparative law analysis, in particular as to German and US law\(^{29}\) are applied to a limited degree, in particular when making proposals *de lege ferenda* when good examples are identified in other legal orders.

This licentiate thesis thus applies the legal dogmatic method to the exclusion of other academic disciplines. The thesis analyses two fields of law which traditionally have been considered as separate fields of law but do share several common objectives: competition law and public procurement law.

1.4.2 Materials

The Swedish/EU competition and public procurement legislation which constitutes the basic material for this licentiate thesis applying the legal dogmatic method is listed in section 5.1. The judgments of Swedish and EU courts which are analysed in this thesis are listed in section 4. As to legal doctrine, articles are listed in section 5.3, books and theses in section 5.4 and other publications in section 5.5.

Some of the theses and books which have influenced me on how to write my thesis are briefly presented below.

\(^{29}\) One reason for including elements of comparative law analysis as to US law and German law is that competition law has a long history in both the US and Germany and that the competition authorities in both countries are relatively influential from an international respectively European perspective.
1.4.2.1 Ernst-Joachim Mestmäcker’s doctoral thesis on information exchange

In 1952, Ernst-Joachim Mestmäcker published his doctoral thesis on ‘Verbandsstatistiken als Mittel zur Beschränkung und Förderung des Wettbewerbs in den USA und Deutschland’.\(^37\) Ernst-Joachim Mestmäcker’s thesis presents a comprehensive study on anti-competitive information exchange under early US and German law.

1.4.2.2 Florian Wagner-von Papp’s doctoral thesis on information exchange

In 2004, Florian Wagner-von Papp presented his doctoral thesis on ‘Marktinformationsverfahren: Grenzen der Information im Wettbewerb’\(^38\) at the Eberhard-Karls University in Tübingen. Florian Wagner-von Papp’s thesis presents a comprehensive study on anti-competitive information exchange under German, EU and US law. It comprises 562 pages and is very much recommended to readers fluent in the German language who would like to read a comprehensive study of anti-competitive information exchange initiated by companies themselves.

1.4.2.3 Grith Skovgaard Ølykke’s thesis on abnormally low tenders

In 2010, Grith Skovgaard Ølykke presented her doctoral thesis on ‘Abnormally Low Tenders With an Emphasis on Public Tenderers’\(^39\) at the University of Copenhagen. Her thesis deals with elements of public procurement law which are related to competition and she has recently published two articles on the relationship between competition and public procurement law\(^40\) which I have used as point of departures for my thesis.

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1.4.2.4 Silke Brammer’s thesis on the co-operation between national competition authorities in the enforcement of EU competition law

In 2008, Silke Brammer presented her doctoral thesis on ‘Co-operation between National Competition Agencies in the Enforcement of EC Competition Law’ at the University of Leuven.31 Silke Brammer’s thesis constitutes a comprehensive monograph on the co-operation between national competition agencies after the decentralised application of EU competition law was introduced in 2004. Her thesis has been a valuable point of departure for me when writing my second licentiate article on ‘Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective’.

1.4.2.5 Albert Sánchez Graells’ book on public procurement and the competition rules

As to the interaction between competition and public procurement law, Albert Sánchez Graells in 2011 published a comprehensive book on ‘Public Procurement and the EU Competition Rules’, followed up with a second edition in 2015.32 One of his main conclusions is that there is an inherent competition principle within public procurement law. The book written by Albert Sánchez Graells has been a valuable point of departure for me when writing my third licentiate article on ‘Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction’.

1.4.3 Outline

After this first introductory chapter, the first three licentiate articles will be presented briefly in chapter two. In the third chapter, the main conclusions of this licentiate thesis will be presented as well as an overview over further research planned at the doctoral level.

All eight licentiate articles are fully reproduced in Appendices D-G.

Appendix A
The first licentiate article is titled ‘Mandatory Supply of Interoperability Information: The Microsoft Judgment’. It focuses on a very specific situation where providing information related to interoperability in the software industry is considered to be pro-competitive to such an extent that Microsoft’s refusal to supply such interoperability information was regarded as an abuse of a dominant position.

Appendix B
The second article is titled ‘Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective’. It focuses on procedural aspects of information exchange, in particular as to the exchange of information and opinions between European competition authorities and courts.

Appendix C
The third article is titled ‘Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction’. The first part of the article focuses on two information exchange related aspects of public procurement, namely information exchange as a monitoring device in bid-rigging cartels and information exchange as a result of tenderers being granted access to sensitive information having been supplied by other tenderers in public procurement proceedings. The second part of the third article analyses a number of issues related to the interaction between competition law and public procurement law. It presents several proposals for legislative measures for enhanced interaction between these two fields of law. Section 3

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35 Robert Molden’s third licentiate article on ‘Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction’ (2012) 15 Europaordinlag Tidskrift 557-615, see Appendix C.
(Framework agreements and competition aspects) and section 4 (Public procurement principles and competition) are based on an analysis of competition aspects of public procurement law, while section 5 (Public procurement and competition law) is based on an analysis of public procurement aspects of competition law.


Appendix I contains a schematic overview of the structure of the licentiate thesis, highlighting how the analysed aspects concerning information exchange relate to each other.
2 BRIEF SUMMARIES OF THE FIRST THREE LICENTIATE ARTICLES

This chapter contains brief summaries of the three previously published licentiate articles listed in Appendices A-C, which together form an integrated part of this compilation licentiate thesis.

2.1 First licentiate article: Mandatory Supply of Interoperability Information: The Microsoft Judgment

The first licentiate article is titled ‘Mandatory Supply of Interoperability Information: the Microsoft judgment’. It focuses on a very specific situation where providing information related to interoperability in the software industry is considered to be pro-competitive to such an extent that Microsoft’s refusal to supply such interoperability information was regarded as an abuse of a dominant position.

On 17 September 2007, the Court of First Instance delivered its judgment in Microsoft Corp. v. Commission of the European Communities (‘the Microsoft judgment’). On 22 October 2007, Microsoft announced that it would not appeal to the European Court of Justice, bringing to an end a lengthy and complex antitrust proceeding initiated by a complaint by Microsoft’s competitor Sun Microsystems, Inc. in 1998.

The Court of First Instance upheld the Commission’s original Microsoft decision of 24 March 2004 as to the substance matter and confirmed that the Commission was entitled to impose a record fine of approximately EUR 497 million on Microsoft. This

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28 Microsoft (Case COMP/C-3/37.792), Commission Decision of 24 March 2004 (‘the Microsoft decision’).
fine relates to two separate infringements of EU antitrust law committed by Microsoft: (i) Microsoft’s refusal to supply interoperability information that is indispensable for competitors to be able to viably compete in the work group server operating system market; and (ii) Microsoft’s tying of Windows Media Player to the Windows operating system. As follows from its title, the first licentiate article focuses exclusively on the first infringement relating to Microsoft’s refusal to supply interoperability information.

This article starts out by providing a quick overview of what the Microsoft case is all about, followed by a brief presentation of the relevant EU legislation and earlier case law, namely the Oscar Bronner, IBM, Tetra Pak II, Magill and IMS Health cases. Moreover, some basic features of the partly parallel US Microsoft case will be presented as to the obligation to supply interoperability information. Then, the reader is provided with an overview of the basic facts of the Microsoft case, in particular regarding the relevant technical features of the software industry.

After this preparatory exercise, the main part of the article presents the different legal approaches taken by the Court as opposed to the Commission and my own views as to what I consider are the real novelties of the Microsoft judgment. Moreover, I discuss one potential drawback of the Microsoft judgment, namely the risk of the court-imposed information exchange spilling over into anti-competitive cooperation in other areas. Finally, I discuss where the Microsoft judgment and the Microsoft decision stand in relation to the Commission’s on-going project aimed at a ‘more economic approach’ in cases concerning abuse of a dominant position.
2.2 Second licentiate article: Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective

The second licentiate article is titled ‘Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective’. It focuses on procedural aspects of information exchange initiated by public authorities, in particular as to the exchange of information and opinions between European competition authorities and courts.

In her book, ‘Co-operation between National Competition Agencies in the Enforcement of EC Competition Law’, Silke Brammer gives the following introduction which is also very well suited to serve as an introduction to my third licentiate article:

In 2004, European competition law underwent the most radical reform since its conception. The changes that this reform involved were so significant that it has been described as a ‘legal and cultural revolution’. The centerpiece of the reform, commonly referred to as ‘modernisation’, is Regulation No 1/2003 on the implementation of Articles [101] and [102 TFEU], which entered into force on 1 May 2004. Regulation 1/2003 has brought about a fundamental reorganisation of the division of responsibilities between the European Commission, the national competition authorities (NCAs) and the courts of the Member States of the European Union. It is said to entail a decentralisation of the enforcement of EC competition law.

Regulation 1/2003 has in fact established a system of full parallel competences in which the Commission, the NCAs and the courts of the Member States share the responsibility to enforce the EC competition rules. Shared competences and ‘decentralised’ application of EC competition law through a multitude of enforcers (instead of one central body – the Commission) makes it necessary that the numerous enforcement bodies collaborate and

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The background to the choice of this topic was that in November and December 2007 was a visiting researcher at the Max Planck Institute for Foreign Private and Private International Law in Hamburg. In 2010, professor Basdevant, the Institute’s president invited me to join a research project funded by the European Commission which he led together with Professor Stephanie Francoq (Leuven) and Laurence Idot (Paris). The subject of the research project was “International Antitrust Litigation: Conflict of Laws and Coordination” and I contributed with a chapter dedicated to procedural aspects of information exchange in the field of competition law enforcement.
coordinate their action in order to avoid conflicts and to ensure the efficient and consistent application of the law.\textsuperscript{41}

By moving from a system of a rather centralised application of EU competition law by a single authority – the Commission – to a system of parallel application of EU competition law by national competition authorities and national courts, the scope for conflicts of laws and jurisdictional issues has significantly increased within the ambit of private enforcement of EU competition law.

However, even though national courts and competition authorities are still free, in principle, to apply national procedural law, Regulation 1/2003 imposes strict limitations as to applying national competition law in cases where trade between Member States may be affected. Where national competition authorities and courts apply national competition law to agreements and concerted practices which may affect trade between Member States, they shall also apply Article 101 TFEU. Where the national competition authorities or courts apply national competition law to any abuse prohibited also by Article 102 TFEU, they shall also apply Article 102 TFEU. The application of national competition law may not lead to the prohibition of agreements or concerted practices which may affect trade between Member States, but which do not restrict competition within the meaning of Article 101(1) TFEU, or which fulfil the conditions for exemption under Article 101(3) TFEU.\textsuperscript{42}

In order to prevent the decentralisation of the application of EU competition law from leading to a significant loss of coherence in uniform application of substantive EU competition law, Regulation 1/2003 introduced a number of new coordination measures, which are the subject of the second licentiate article.

\textsuperscript{41} Brummer, Silke, Co-operation between National Competition Agencies in the Enforcement of EC Competition Law, doctoral thesis presented at the University of Leuven (Oxford, Hart Publishing, 2009).\textsuperscript{1}

\textsuperscript{42} See Art 3 Regulation 1/2003.
Since May 2004, the Commission is entitled, acting on its own initiative, to submit written *amicus curiae* observations on the application of EU competition law to national courts where the coherent application of EU competition law so requires. National competition authorities are entitled to submit such written *amicus curiae* observations irrespective of whether the coherent application of EU competition law so requires.\textsuperscript{43} National courts on their side are entitled to ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.\textsuperscript{44} In order to enable the Commission to monitor national court proceedings where EU competition law is applied, Member States are obliged to forward to the Commission a copy of any written judgment of national courts applying EU competition law.\textsuperscript{45}

These new powers do not affect the pre-existing right of national courts to make references for a preliminary ruling on the interpretation of EU competition law to the Court of Justice under Article 267 TFEU.

After presenting the different coordination measures envisaged in Regulation 1/2003 and Article 267 TFEU to foster the coherent application of EU competition law, the article then proceeds to analyse how well these measures have been working in practice by looking at specific examples of their application. Moreover, part VII.B contains an overview of the legislative history of the coordination measures now embodied in Article 15 Regulation 1/2003. The ultimate objective of the second licentiate article is to come up with specific proposals on how to improve the effectiveness of the system. These proposals – which concern both potential amendments to Regulation 1/2003 as well as potential amendments of national competition law – are summarised in the conclusions to the article.

\textsuperscript{43} Art 15(3) Regulation 1/2003.
\textsuperscript{44} Art 15(1) Regulation 1/2003.
\textsuperscript{45} Art 15(2) Regulation 1/2003.
Ideally, this article would look at how the system is applied in all the 28 Member States. However, for practical reasons, I have decided to focus on the one Member State whose legal system I am most familiar with, i.e. Sweden. This delimitation enables me to make a comprehensive study of all cases where the coordination system embodied in Regulation 1/2003 and Article 267 TFEU has been applied in practice in Sweden.

2.3 Third licentiate article: Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction

The third licentiate article is titled 'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction'. The first part of the article focuses on two information exchange related aspects of public procurement, namely information exchange as a monitoring device in bid-rigging cartels and information exchange as a result of tenderers being granted access to sensitive information having been supplied by other tenderers in public procurement proceedings. The second part of the article analyses in its sections 3 to 5 a number of issues related to the interaction between competition law and public procurement law. It presents several proposals for legislative measures for enhanced interaction between these two fields of law. Section 3 (Framework agreements and competition aspects) and section 4 (Public procurement principles and competition) are based on an analysis of competition aspects of public procurement law, while section 5 (Public procurement and competition law) is based on an analysis of public procurement aspects of competition law. In the following, each of sections 2 to 5 of the third licentiate article is summarised somewhat more in detail.

Section 2 sets out various aspects of how competition law is applied on actions by tenderers in public procurement proceedings. Firstly, I present Swedish case law concerning bid-rigging. A proposal is presented to amend the Swedish Public

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48 Robert Moldén’s third licentiate article on ‘Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction’ (2012) 15 Europarättslig Tidskrift 557-615, see Appendix C.
Procurement Act in order to highlight the unlawfulness of bid-rigging/joint tenders under Swedish competition law. Then I analyze public procurement and anti-competitive information exchange in general, followed by an analysis of Swedish case law concerning the protection of business secrets in public procurement proceedings.

Section 3 focuses on competition aspects related to framework agreements as stipulated by Article 32(2) of Directive 2004/18/EC. In particular, the case of too long respectively too large framework agreements will be analysed. As to the latter situation—too large framework agreements—a proposal to amend the Swedish Public Procurement Act will be presented to bring its provisions in line with the Directive in this respect.

Section 4 provides an overview of how competition aspects have been dealt with in Swedish case law related to the principle of proportionality, respectively the principle of equality. Then the purpose of public procurement law is discussed, arguing for the need to apply a general competition principle in public procurement law as proposed by Albert Sánchez Graells in his above-mentioned book.

Section 5 of the third licentiate article addresses the issue of competition law applicable to actions by contracting authorities. The EU case law in the FENIN and SELEX judgments is analysed and criticised as it, arguably, limits the application of competition law to public procurement law for no good reason. A reversal of this case law is therefore proposed in line with the suggestions made by Albert Sánchez Graells in his above-mentioned book. Finally, competition law applicable to long-term agreements and joint purchasing is presented, making analogies to the public procurement rules on too long, respectively too large framework agreements.
3 CONCLUSIONS

3.1 Conclusions regarding mandatory supply of interoperability information and the Microsoft judgment

Competition law often aims at preventing the exchange of strategic information between competing firms. The Microsoft judgment constitutes a striking example of the opposite, i.e. where competition law actually required Microsoft, as a holder of a dominant position, to hand over strategic interoperability information to its competitors. The Microsoft judgment is an instructive example of information exchange between competitors which would not have occurred in the absence of intervention by public authorities.

The judgment of the Court of First Instance in Microsoft represents a major success for the European Commission in its fight against abuses of a dominant position. The Court upheld the Commission’s findings that Microsoft abused its dominant position by refusing to supply interoperability information that is indispensable for competitors to be able to viably compete in the work group server operating system market. Moreover, the Court upheld the record fine of approximately EUR 497 million. According to the Court, the judgment does not contain any legal novelty, as it simply applies earlier Magill/IMS Health case law. However, it may be argued that the judgment does contain a legal novelty as to the scope of the so-called new product condition. Arguably, the judgment considerably diminishes the scope for a dominant firm to rely on intellectual property rights as a defence in antitrust proceedings concerning the abuse of a dominant position. In particular, it will probably be more difficult for a dominant firm to invoke the firm’s intellectual property rights as a justification for refusing to supply indispensable interoperability information to the firm’s competitors.
3.2 Conclusions regarding the exchange of information and opinions between European competition authorities and courts

As set out above, this thesis on information exchange focuses on information exchange related to public procurement or otherwise initiated by public authorities. While the other aspects covered in this thesis analyse substantive competition and public procurement law, the aspect at hand concerns procedural law. When competitors exchange strategic information, anti-competitive effects are likely to occur. However, when information and opinions as to on-going competition law cases are exchanged between competition authorities and courts in the EU, this may entail significant efficiency gains as to the effectiveness of competition law enforcement in the EU. It is therefore interesting to analyse how the present system works and to make proposals for how the system could be improved.

The modernisation of the application of EU competition law in May 2004 entailed a far-reaching decentralisation, empowering national courts and national competition authorities to fully apply EU competition law. The only way for a national court to obtain binding guidance on the interpretation of EU competition law is to make a reference for a preliminary ruling to the Court of Justice. However, this procedure entails an average delay of 15–16 months due to time needed for the Court of Justice to process a reference. During the first 14 years of Sweden’s EU membership, from 1995 to 2009, Swedish courts made references for preliminary rulings in 67 cases; only two of these references concern the interpretation of EU competition law.

In order to prevent the decentralisation of the application of EU competition law from leading to a significant loss of coherence in the uniform application of substantive EU competition law, Regulation 1/2003 introduced a number of new coordination measures, which are the subject of my contribution.
Between May 2004 and April 2009, the Commission received 18 requests for an opinion on the application of EU competition law, including two requests from Swedish courts. In the same period, the Commission submitted written amicus curiae observations on the application of EU competition law to national courts on two occasions. Since then, the Commission has decided to submit amicus curiae observations on at least three more occasions. The Swedish Competition Authority submitted its first ever amicus curiae observations in the *Soda Club* case on 25 March 2010.

I share the view expressed in the Commission’s Report on the functioning of Regulation 1/2003 from April 2009 that there are good reasons for the Commission to have greater recourse to the instrument of amicus curiae observations.

Before the entry into force of Regulation 1/2003, Swedish courts regularly requested opinions on the interpretation of Swedish and EU competition law from the Swedish Competition Authority. While Swedish courts still regularly request opinions from the Swedish Competition Authority on the interpretation of Swedish and EU public procurement law, no Swedish court has requested any opinion on the interpretation of EU competition law since the entry into force of Regulation 1/2003.

One possible explanation for the absence of any requests of opinions from the Swedish Competition Authority may be an *e contrario* interpretation of Article 15(1) Regulation 1/2003, which would lead to the conclusion that Regulation 1/2003 as of May 2004 precludes national courts from requesting opinions on the interpretation of EU competition law from a national competition authority as no such right is foreseen by Article 15(1) Regulation 1/2003. In my view, such an *e contrario* interpretation of Regulation 1/2003 is not appropriate. Instead, Regulation 1/2003 should correctly be understood not to constitute any legal obstacle for Swedish courts’ right under Swedish procedural law to
request an opinion from the Swedish Competition Authority on the interpretation of Swedish or EU competition law.

It appears that the pros and cons of giving national courts a right under Article 15(1) to request information and opinions also from national competition authorities – as opposed to only from the Commission – were not really debated during the legislative process behind Regulation 1/2003.

In my view, there are good reasons for the Commission to consider amending Article 15(1) Regulation 1/2003 in this respect, giving national courts the explicit right to request information and opinions also from national competition authorities. Such an amendment may lead to a more efficient coordination scheme. I consider that this right would be particularly useful in private enforcement cases before courts lacking such expert knowledge of EU competition law which is held by judges active at the specialised courts of public competition law enforcement. The subsequent intrusion into the procedural autonomy of the Member States may well be a price worth paying. Moreover, the degree of additional intrusion into the procedural autonomy of Member States is rather limited as compared to the quite far-reaching intrusion into the procedural autonomy of Member States already caused by the introduction of the right of the national competition authorities and the Commission to submit amicus curiae observations on their own initiative to national courts.

In order to enable the Commission to monitor national court proceedings where EU competition law is applied, its Member States are obliged to forward to the Commission a copy of any written judgment of national courts applying EU competition law. However, it appears that a significant number of such judgments are not reported to the Commission.

One possible explanation for the poor performance of Member States may be a lack of clarity in national competition law on which court or authority shall be responsible for
the forwarding of judgments to the Commission. In this respect, it is interesting to look at the provisions of Article 90a(1) German Act against Restraints of Competition. These provisions state explicitly that it is the duty of the German court giving the judgment to forward a copy to the Bundeskartellamt, which then forwards it to the Commission.

In my view, the provisions of Article 90a German Act against Restraints of Competition may serve as an example of high clarity and user-friendliness concerning the rights and duties of national courts stemming from Article 15 Regulation 1/2003. In particular, I propose that similar provisions should be inserted into the Swedish Competition Act to increase clarity and make clear which authority is responsible for ensuring that copies of judgments by Swedish courts on EU competition law are forwarded to the Commission. Moreover, I propose that corresponding amendments should be made in competition legislation of other Member States which lack the clarity and user-friendliness of the German Act against Restraints of Competition.

3.3 Conclusions regarding the role of competition in public procurement law

The Swedish Public Procurement Act should be amended to highlight the duty not to restrict competition in connection to framework agreements embodied under Art 32 (2) of the Classical Sector Directive. This duty should be transferred from soft law to a hard legal ground for court intervention in case of breach.

The competition principle embodied in the Classical Sector Directive imposes an active obligation to ensure that the way contracting authorities conduct public procurement proceedings is pro-competitive and not anti-competitive. Swedish administrative courts should therefore not treat the Directive’s pro-competition provisions as soft law but as hard law in the sense that infringements of the competition principle should be considered as infringements of the Swedish Public Procurement Act in the same way as infringements of, e.g. the principles of proportionality and equality. Appendices D-H contain five short articles on the principle of competition published in the Swedish

According to the *FENIN/SELEX* case law of the Court of Justice of the European Union, competition law is only applicable to purchase activities within public procurement if ‘the subsequent use of the purchased goods amounts to an economic activity’. Even very large joint purchases, made by contracting authorities having very high market shares on the buying market, are thus currently exempted from EU and consequently Swedish competition law – to the extent that the goods and services purchased are to be used exclusively for the exercise of public power. As Albert Sánchez Graells has rightly concluded in his book on Public Procurement and the EU Competition Rules⁴⁷, the *FENIN – SELEX* case law is not well-founded and should be reversed so that purchases by ways of public procurement fall under the scope of competition law irrespective of the consequent use made of the products or services by the contracting authority.

A significant portion of goods and services purchased by Swedish contracting authorities are subsequently used for economic activities. According to the *FENIN/SELEX* settled case law of the Court of Justice of the European Union, competition law is applicable to such purchases. However, in view of a lack of enforcement activities from the Swedish Competition Authority in this regard, many contracting authorities may be unaware of this fact. The Swedish Competition Authority should therefore consider attributing a higher level of priority to this issue. Any investigation initiated by the Swedish Competition Authority in this respect could generate a powerful signal to contracting authorities that competition law should be taken into account when designing public procurement proceedings.

Private enforcement of competition law may have an important role to play as to anti-competitive agreements entered into by contracting authorities. Whereas voidness

actions based on infringements of public procurement law are time-barred when six months have passed after signing of the agreement, injunction actions based on voidness resulting from on-going competition law infringements may be brought during the entire lifetime of an agreement entered into by a contracting authority.

3.4 Conclusions regarding information exchange and bid-rigging cartels

The provisions in the LOU which explicitly stipulate that tenderers are entitled to submit joint tenders or to assign each other as sub-contractors are misleading as the uninformed reader is made to believe that the provisions take precedence over potential competition law issues in this respect. However, joint bids are only legal under competition law if it would not have been possible for any of the tenderers to submit independent tenders without help from the other parties to the joint tender. Therefore, I propose that the Swedish Public Procurement Act should be amended such as to contain an explicit warning and reference to the Swedish Competition Act. A possible wording could be: ‘Joint tenders and assignment of sub-contracts between competitors or potential competitors may under certain circumstances constitute an infringement of Chapter 2 Article 1 of the Swedish Competition Act or Article 101 TFEU’.  

3.5 Conclusions regarding the protection of sensitive information in public procurement proceedings

Swedish administrative courts generally do take into account the distortion of competition which would arise if strategic information submitted by one tenderer in a public procurement proceeding is handed over to competing tenderers under the Swedish Public Access to Information and Secrecy Act. However, case law is far from

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48 LOU Chapter 1, Article 11.
49 LOU Chapter 11, Article 12.
50 It is interesting to note that the Swedish Competition Authority in April 2013 published interactive electronic guidance on the conditions for submitting joint tenders in public procurement proceedings. The Swedish language guidance is available on http://www.konkurrensverket.se/asp/samarbete/story.html.
settled and further clarifications from the Swedish Supreme Administrative Court would be welcome.

3.6 General conclusions and overview over further research within the future doctoral thesis

Each of the first three articles included in this licentiate compilation thesis covers different aspects of information exchange related to public procurement or otherwise initiated by public procurement. In sections 3.1 to 3.5 above, I have listed the main conclusions for each of the aspects studied. As set out in section 1.2 above, I have chosen to dedicate a relatively large part of the thesis to the de lege ferenda perspective. Most of the conclusions presented in the thesis therefore constitute proposals on how to amend the law to improve its effectiveness, alternatively how to amend Swedish law in order to make it compatible with the requirements of EU law. The proposed amendments to the law are quite specific for each of the aspects studied. Therefore, it is quite difficult at this stage to draw any general conclusions covering all different aspects of information exchange related to public procurement or otherwise initiated by public authorities.

Finally, the present licentiate compilation thesis does not only constitute a licentiate thesis, it also constitutes an important check-point on the road towards a doctoral thesis to be presented at the Stockholm School of Economics in 2018. The doctoral thesis is planned to constitute a monograph with the working title ‘The New Competition Principle of the New Public Procurement Directives from a Swedish Perspective’, thus substantially deepening and broadening the analysis of the competition principle undertaken at the licentiate level. Appendices D-H contain five short articles on the principle of competition published in the Swedish journal Upphandling 24 during 2014 and 2015 and on the Swedish on-line public procurement journal Inköpsrådet during 2016, to be followed up in my doctoral thesis.
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APPENDIX A: FIRST LICENTIATE ARTICLE
‘Mandatory Supply of Interoperability Information:
The Microsoft Judgment’

Mandatory Supply of Interoperability Information: The Microsoft Judgment

Robert Moldén*

1. Introduction........................................................................................................... 307
2. What is this case all about? The Commission’s theory of harm .................. 308
3. Relevant legislation.............................................................................................. 309
3.1 Article 82 EC ................................................................................................... 309
3.2 The Software Directive...................................................................................... 310
4. Earlier EU case law.............................................................................................. 311
4.1 The IBM Undertaking (1984)........................................................................ 311
4.2 Magill (1995)................................................................................................. 311
4.3 Tetra Pak II (1996).......................................................................................... 312
4.4 Oscar Brunner (1998).................................................................................... 312
4.5 IMS Health (2004).......................................................................................... 313
5. The US Microsoft case (2002)........................................................................... 313
6. The facts of the EU Microsoft case..................................................................... 314
6.1 The operational part of the decision as upheld by the Court of First Instance .......................................................................................... 314
6.2 Technical and historical background ................................................................ 315
6.3 To clone or not to clone: the crucial difference between implementations and specifications of protocols .............................................................. 316
6.4 The two main alternative levels of interoperability set out in the Microsoft decision .......................................................................................... 317
6.4.1 Microsoft’s Communications Protocols Licensing Program .................... 317
6.4.2 The Software Directive ............................................................................. 318
7. Definition of the relevant market and finding of dominance ......................... 319

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Abstract
The judgment of the Court of First Instance in Microsoft represents a major success for the European Commission in its fight against abuses of a dominant position. The Court upholds the Commission’s findings that Microsoft abused its dominant position by refusing to supply interoperability information that is indispensable for competitors to be able to viably compete in the work group server operating system market. Moreover, the Court upholds the record fine of approximately EUR 497 million. According to the Court, the judgment does not contain any legal novelty, as it simply applies earlier Magill/IMS Health case law. However, it may be argued that the judgment does contain a legal novelty as to the scope of the so-called new product condition. Specifically, it may be argued that the judgment considerably diminishes the scope for a dominant firm to rely on intellectual property rights as a defence in antitrust proceedings concerning the abuse of a dominant position.

Keywords: abuse of a dominant position, intellectual property rights, mandatory supply of interoperability information, essential facility, new product condition, Magill/IMS case law.
1. **INTRODUCTION**

On 17 September 2007, the Court of First Instance delivered its judgment in *Microsoft Corp. v. Commission of the European Communities* ("the Microsoft judgment"). On 22 October 2007, Microsoft announced that it would not appeal to the European Court of Justice, bringing to an end a lengthy and complex antitrust proceeding initiated by a complaint by Microsoft's competitor Sun Microsystems, Inc. ("Sun") in 1998.

The Court of First Instance ("the Court") upheld the Commission's original *Microsoft decision* of 24 March 2004 as to the substance matter and confirmed that the Commission was entitled to impose a record fine of approximately EUR 497 million on Microsoft. This fine relates to two separate infringements of EU antitrust law committed by Microsoft: (i) Microsoft's refusal to supply interoperability information that is indispensable for competitors to be able to viably compete in the workgroup server operating system market; and (ii) Microsoft's tying of Windows Media Player to the Windows operating system.

As follows from its title, this article will focus exclusively on the first infringement relating to Microsoft's refusal to supply interoperability information. Moreover, this article will only deal with issues of EU antitrust law, hence it will not cover Microsoft's argument – which was not accepted by the Court – that the Commission's decision infringed the TRIPS Agreement.

It should be noted that Microsoft's lawyers were successful on one important procedural issue. The Court in fact annulled the Commission's decision as to the appointment of a special trustee to monitor Microsoft's compliance with its obligations under the decision. The Court found that the Commission had no legal ground for conferring far-reaching powers to the trustee nor for obliging Microsoft to finance the monitoring costs. However, this procedural issue falls outside the scope of this article and will not be analysed further.

Moreover, on 27 February 2008, the Commission decided to impose a penalty of EUR 899 million on Microsoft for non-compliance with the Commission's decision of March 2004 as to the obligation to supply interoperability information.

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on reasonable terms. However, any further analysis of this decision is outside the scope of this article.

This article will start out by providing a quick overview of what the Microsoft case is all about, followed by a brief presentation of the relevant EU legislation and earlier case law, namely the Oscar Bronner, IBM, Tetra Pak II, Magill and IMS Health cases. Moreover, some basic features of the partly parallel US Microsoft case will be presented as to the obligation to supply interoperability information. Then, the reader will be provided with an overview of the basic facts of the Microsoft case, in particular regarding the relevant technical features of the software industry.

After this preparatory exercise, we will come to the main part of the article, in which I will present the different legal approaches taken by the Court as opposed to the Commission and my own views as to what I think are the real novelties of the Microsoft judgment. Moreover, I will discuss one potential drawback of the Microsoft judgment, namely the risk of the Court-imposed information exchange spilling over into anti-competitive cooperation in other areas. Finally, I will discuss where the Microsoft decision and judgment stand in relation to the Commission’s ongoing project aimed at a ‘more economic approach’ in cases concerning abuse of a dominant position.

2. **WHAT IS THIS CASE ALL ABOUT? THE COMMISSION’S THEORY OF HARM**

The Microsoft judgment consists of 174 pages, and the Commission uses no less than 301 pages to formulate its decision. Fortunately, in this jungle of 475 pages, there are two recitals in which the Commission sets out its theory of harm underlying the entire procedure very clearly. These recitals are reproduced here:

As regards the refusal to supply abuse, Microsoft has engaged in a general pattern of conduct which focuses on the creation and sole exploitation of a range of privileged connections between its dominant client PC operating system and its work group server operating system, and on the disruption of previous levels of interoperability. The interoperability information at stake is indispensable for competitors to be able to viably compete in the work group server operating system market.

Microsoft’s abuse enables it to extend its dominant position to the market for work group server operating systems. This market is in itself of significant value: it concerns products that are part of the basic infrastructure used by office workers around the world in their day-to-day work. In addition, capturing the work group server operating system market is liable to have further

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effects detrimental to competition. First, it would erect further barriers to entry in the client PC operating system market and limits the risk of a change of paradigm that could strip Microsoft’s overwhelming dominance on the client PC operating system market of its competitive importance. Second, it would provide a bridgehead from which Microsoft could further leverage its position into other areas of the server industry.6

One striking feature of the Microsoft case is that the Commission not only had a theory of harm by leveraging but that it also had convincing evidence that the senior management of Microsoft in fact explicitly promoted the very leveraging on which the Commission built its case. The Court thus observes that a number of internal documents confirmed that ‘Microsoft made use, by leveraging, of its dominant position on the client PC operating systems market to strengthen its position on the work group server operating systems market.’7

For example, Mr Bayer, a senior director of Microsoft, sent an e-mail to Mr Madigan, another senior director of Microsoft, in which he stated that ‘[Microsoft] has a huge advantage in the enterprise computing market by leveraging the dominance of the Windows desktop’.8

Another e-mail between the two senior directors of Microsoft contains the following passage: ‘Dominance on the server infrastructure on the Internet is a tougher nut to crack [but] we just might be able to do it from the enterprise out if we could own the enterprise (which I think we can).’9

The Court finds that ‘it is clear that the most senior directors of Microsoft regarded interoperability as a tool in that leveraging strategy.’ It cites the following extract from a speech given by Mr Gates in 1997, the year before Sun’s complaint to the Commission: ‘What we are trying to do is use our server control to do new protocols and lock out Sun and Oracle specifically ... Now, I don’t know if we’ll get to that or not, but that’s what we are trying to do.’10

3. RELEVANT LEGISLATION

3.1 Article 82 EC

Article 82 EC prohibits the abuse of a dominant position. In particular, Article 82(b) of the Treaty provides that abuse as prohibited by that article may consist in limiting technical development to the prejudice of consumers.

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6 The Commission’s decision, recitals 1064-1065.
7 The Microsoft judgment, para. 1347.
8 Ibid.
9 Ibid., at para. 1348.
10 Ibid., at para. 1349.
The exact wording of the provision is as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

... 

(b) limiting production, markets or technical development to the prejudice of consumers; ...

3.2 The Software Directive

The issue of interoperability is addressed in the Council Directive of 14 May 1991 on the legal protection of computer programs ('the Software Directive'),\(^{11}\) which harmonises copyright protection of computer programs in the Member States. Article 6 of the Directive stipulates that the authorisation of the holder of a copyright over a computer program may not be required for the decompilation of parts of that program, where this is 'indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs'. This is subject to certain conditions, in particular that the independently created program shall not be 'substantially similar in its expression' to the decompiled program.\(^ {12}\)

The Software Directive contains a number of definitions on interoperability and related expressions. As will be set out below in section 6.4, these definitions were subject to dispute between Microsoft and the Commission. They are therefore reproduced here:

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as 'interfaces';


\(^{12}\) See the Commission's decision, recital 746.
Case Note – The Microsoft Judgment

Whereas this functional interconnection and interaction is generally known as ‘interoperability’; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged. ¹³

4. EARLIER EU CASE LAW

4.1 The IBM Undertaking (1984)

In the case that led to the IBM Undertaking,¹⁴ IBM was alleged to hold a dominant position for the supply of two key products, the central processing unit and the operating system, for its most powerful range of computers, the IBM System/370. The Commission objected, inter alia, to IBM’s practice of failing to supply so-called ‘plug-compatible manufacturers’ in sufficient time with the technical information needed to permit their products — which competed with IBM’s own products — to be used with System/370.

As part of that undertaking, IBM agreed to disclose, in a timely manner, sufficient interface information to enable competing companies in the Community to attach both hardware and software products of their design to System/370. Furthermore, IBM agreed to disclose adequate and timely information to competitors to enable them to interconnect their systems or networks with IBM’s System/370 using a set of network protocols which IBM had developed, its ‘Systems Network Architecture’.

4.2 Magill (1995)

Magill concerned the refusal of TV broadcasters to license intellectual property in the form of (copyright-protected) programme listings. The Court of Justice stated that ‘the refusal by the owner of an exclusive right [copyright] to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position’.¹⁵ It pointed out, however, that ‘the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct’.¹⁶ On this basis, the Court of Justice upheld the

¹³ Recitals 10, 11 and 12 of the Software Directive.
¹⁴ This description of the IBM Undertaking is taken from the Commission’s decision, recitals 737-738.
Commission's decision (and the judgment of the Court of First Instance), which mandated compulsory licensing of the right to reproduce the copyrighted programme listings.

Three sets of exceptional circumstances were identified in *Magill*. First, the Court of Justice underlined that the dominant undertakings' refusal prevented the appearance of a new product that the dominant undertakings did not offer and for which there was a potential consumer demand. As such, the refusal was inconsistent in particular with Article 82(b) EC, which provides that abuse as prohibited by Article 82 of the Treaty may consist in 'limiting production, markets or technical development to the prejudice of consumers'. Second, the Court of Justice pointed out that the conduct in question enabled the dominant undertakings to reserve 'to themselves the secondary market of weekly television guides by excluding all competition on that market'. Third, the refusal was not objectively justified.

4.3 *Tetra Pak II* (1996)

In addition to the *IBM* case mentioned above, the requirement to offer interoperability in order to enable competition on the merits to unfold played a role in *Tetra Pak II*. In that case, the Commission not only considered the contractual tying in which Tetra Pak had engaged to be abusive and required its termination but also decided that Tetra Pak 'shall inform any customer purchasing or leasing a machine of the specifications which packaging cartons must meet in order to be used on its machines'.¹⁷ The Court of First Instance and the Court of Justice upheld the Commission's decision.

4.4 *Oscar Bronner* (1998)

In *Bronner*,¹⁸ a preliminary ruling on the basis of Article 234 EC, access to a nation-wide home-delivery scheme for newspapers was at stake. The Court of Justice concluded that, in that specific case, there was no obligation to deal pursuant to Article 82 EC, finding that access to the scheme was not indispensable for Bronner to stay in the newspaper market.

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¹⁷ See Article 3(5) of Commission Decision 92/163/EEC and the judgment of the Court of First Instance in Case T-83/91 *Tetra Pak II* [1994] ECR II-755, at para. 139. This description of the *Tetra Pak* case is taken from the Microsoft decision, recital 742.

4.5 **IMS Health (2004)**

In *IMS Health*, the Court of Justice again ruled on the conditions under which a refusal by an undertaking holding a dominant position to grant to a third party a licence to use a product protected by an intellectual property right might constitute abusive conduct within the meaning of Article 82 EC.

The Court of Justice confirmed that, according to settled case law, the exclusive right of reproduction formed part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of that position. The Court of Justice also observed that it was clear from that case law that the exercise of an exclusive right by the owner might, in exceptional circumstances, involve abusive conduct. After reciting the exceptional circumstances found to exist in *Magill*, the Court of Justice held that it followed from that case law that, in order for the refusal by an undertaking that owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it was sufficient that three cumulative conditions be satisfied, namely, that the refusal prevents the emergence of a new product for which there is a potential consumer demand, that it is unjustified and that it is such as to exclude any competition on a secondary market.

It should be noted that the Court of Justice rendered its judgment in *IMS Health* on 29 April 2004, that is, well after the Commission's *Microsoft* decision of 24 March 2004.


In parallel with the Commission's investigation, Microsoft was subject to an investigation for violation of US antitrust legislation.

In 1998, the United States of America, twenty states and the District of Columbia brought proceedings against Microsoft under the Sherman Act and the respective states' own antitrust legislation. Their complaints concerned the

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measures taken by Microsoft against Netscape's Internet Navigator and Sun's Java technologies.

After the US Court of Appeals for the District of Columbia Circuit, on appeal by Microsoft against the judgment of 3 April 2000 of the US District Court for the District of Columbia, had given its judgment on 28 June 2001, Microsoft reached a settlement with the US Department of Justice and the Attorneys General of nine states in November 2001, in which two types of commitments were given by Microsoft.

The commitment relevant for the present article consisted in Microsoft agreeing to draw up the specifications of the communication protocols used by the Windows server operating systems in order to interoperate, that is to say, to make them compatible with the Windows client PC operating systems and to grant third parties licences relating to those specifications on specific conditions.

Those provisions were confirmed by a judgment of the District Court of 1 November 2002. On 30 June 2004, the Court of Appeals, on appeal by the State of Massachusetts, affirmed the judgment of the District Court of 1 November 2002. Pursuant to the US settlement, the Microsoft Communications Protocol Program was set up in August 2002, setting out the details for how Microsoft was to supply interoperability information (see below under section 6.4).

6. **The facts of the EU Microsoft case**

6.1 **The operational part of the decision as upheld by the Court of First Instance**

The main operational part of the Commission’s decision as upheld by the Court reads as follows:

_**Article 2**_

Microsoft Corporation has infringed Article 82 of the Treaty and Article 54 of the EEA Agreement by:

(a) refusing to supply the _Interoperability Information_ and allow its use for the purpose of developing and distributing work group server operating system products, from October 1998 until the date of this Decision;

(b) making the availability of the _Windows Client PC Operating System_ conditional on the simultaneous acquisition of _Windows Media Player_ from May 1999 until the date of this Decision.[21]

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[21] As mentioned in the introduction, the second infringement – the tying of _Windows Media Player_ to the _Windows Client PC Operating System_ – will not be analysed further in this article.
Case Note – The Microsoft Judgment

Article 5

As regards the abuse referred to in Article 2 (a):

(a) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, make the Interoperability Information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms,[22] allow the use of the Interoperability Information by such undertakings for the purpose of developing and distributing work group server operating system products; ...

6.2 Technical and historical background

In a modern office, computers are linked together in a network controlled by one or more servers. A computer that can be linked to such a network is called a client PC. The software controlling the basic functions of a client PC or a server is referred to as an operating system. If a given network runs on a Microsoft operating system, the network is called a Windows work group network and may also be referred to as a Windows domain.

The Commission’s decision focuses on Microsoft’s Windows 2000 generation of operating systems, while observing that the essential characteristics of those systems are similar to those of the next generation of systems (namely the Windows XP Home Edition and Windows XP Professional operating systems for client PCs and the Windows 2003 Server operating system for servers).[23] The operating system preceding the Windows 2000 generation of operating systems was the Windows NT 4.0 operating system.

According to the Commission’s decision, a historic look at the work group server operating system market shows that Microsoft entered this market relatively recently. Customers had started to build work group networks that contained non-Microsoft work group servers and Microsoft’s competitors had a distinct technological lead. The value that their products brought to the network also augmented the client PC operating system’s value in the customer’s eyes and therefore Microsoft – as long as it did not have a credible work group server operating system alternative – had incentives to have its client PC operating system interoperate with non-Microsoft work group server operating systems. While entering the work group server operating system market, pledging support...

[22] Providing access on reasonable and non-discriminatory terms (RAND) is quite a complex concept that is beyond the scope of this article. For an in-depth analysis of the RAND concept, see Damien Geradin and Miguel Rato, ‘Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND’, 3 European Competition Journal (2007) p. 101.

[23] See the Microsoft Judgment, para. 164.
for already established technologies was important in gaining a foothold and the confidence of the customers.24

Once Microsoft’s work group server operating system gained acceptance in the market, however, Microsoft’s incentives changed and holding back access to information relating to interoperability with the Windows environment started to make sense. According to the Commission’s decision, when moving from the Windows NT 4.0 operating system to the Windows 2000 operating system, Microsoft then engaged in a strategy of diminishing previous levels of supply of interoperability information.25

6.3 To clone or not to clone: the crucial difference between implementations and specifications of protocols

In the Microsoft judgment, the word clone (including ‘cloning’, ‘clones’ and ‘cloned’) appears no less than twenty-three times. Microsoft’s strategy seems to have been to make this a case about cloning. Many people will think about the famous ‘Dolly the Sheep’, whose cloning gave birth to a number of cloned Dollies. Analogously, forcing Microsoft to provide interoperability information would give birth to a number of Dolly-style cloned work group server operating systems being functionally identical to the original, that is, Microsoft’s own operating system. At first sight, such cloning does not seem to make any common sense at all.

In order to understand Microsoft’s and the Commission’s opposite views as to whether the mandatory supply of interoperability information amounts to functional cloning, it is important to note how interoperability information is defined by the Commission and the Court:

For the purposes of the contested decision, ‘interoperability information’ is the ‘complete and accurate specifications for all the protocols [implemented] in Windows work group server operating systems and ... used by Windows work group servers to deliver file and print services and group and user administrative services, including the Windows domain controller services, Active Directory services and ‘group Policy’ services to Windows work group networks’ (Article 1(1) of the contested decision).26

The Court points out that, in its decision, the Commission emphasises that the refusal in question does not relate to Microsoft’s ‘source code’ but only to specifications of the protocols concerned, that is to say, to a detailed description of what the software in question must achieve, in contrast to the implementations,

24 See the Commission’s decision, recital 587.
25 Ibid., at recital 588.
26 The Microsoft judgment, para. 37.
consisting of the implementation of the code on the computer. The Commission states, in particular, that it ‘does not contemplate ordering Microsoft to allow copying of Windows by third parties’.27

According to the Commission’s decision,28 competitors that obtain specifications of protocols still need to spend significant amounts of time and money to produce their own source code to implement the specifications of the protocols. Therefore, as upheld by the Court,29 the Commission found that Microsoft was wrong to argue that the decision would allow Microsoft’s competitors to copy or clone Microsoft’s products.

6.4 The two main alternative levels of interoperability set out in the Microsoft decision

6.4.1 Microsoft’s Communications Protocols Licensing Program

In September 2002, Microsoft launched the Communications Protocols Licensing Program in order to implement the US judgment set out above in section 5. The relevant provision of the US judgment provides that

Microsoft shall make available for use by third parties, for the sole purpose of interoperating or communicating with a Windows Operating System Product, on reasonable and non-discriminatory terms ... any Communications Protocol that is ... (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product.30

Microsoft therefore argued that the Commission’s ‘allegations about interoperability with Windows client operating system have been overtaken by the passage of time’. According to Microsoft, this was so because

‘the communications protocol licensing program that Microsoft created pursuant to the U.S. Final Judgment allows any vendor of server operating systems to license any or all of the communications protocols that Windows server operating systems use to communicate with Windows client operating system’. Microsoft concluded from this that ‘there is no client-to-server interoperability issue, to the extent there ever was one’.31

27 Ibid., at para. 40.
28 See the Commission’s decision, recitals 719-721.
29 See the Microsoft judgment, paras. 657-658.
30 See the Commission’s decision, recital 274.
31 Ibid., at recital 688.
According to the Commission’s decision, Microsoft’s argument was based on an inadequate distinction between ‘client-to-server interoperability’ and ‘server-to-server interoperability’. In a Windows work group network, client-to-server and server-to-server interoperability are tightly linked to one another. The Communications Protocol Licensing Program only provides for the disclosure of protocols used for communication between a Windows client PC and a Windows work group server. The Program contractually excludes use of the disclosure for any server-to-server communication. This provision renders integration of a non-Microsoft work group server in the Windows domain architecture impossible. The Commission therefore concluded that the Communications Protocols Licensing Program does not resolve the problem of insufficient disclosure of interoperability information by Microsoft.\footnote{Ibid., at recitals 688-691.}

6.4.2 The Software Directive

In its response of 17 November 2000 to the first statement of objections, Microsoft stated that the degree of interoperability apparently required by the Commission is not consistent with Community law and does not exist in the market. Relying, more particularly, on the 10th recital (in the English and French versions) to Directive 91/250 set out above in section 3.2, Microsoft submitted that ‘full interoperability is available to a developer of server operating systems when all of the functionality of his program can be accessed from a Windows client operating system’. Microsoft maintained that the Commission wrongly defines interoperability much more broadly when it considers that, for there to be interoperability between two software products, all the functionalities of both products must function correctly. That, in Microsoft’s contention, is tantamount to requiring ‘plug-replaceability’ or ‘cloning’. In order to achieve full interoperability, it is sufficient that Microsoft should disclose the interfaces exposed by the Windows client PC operating systems which developers of competing server operating systems need in order to make the functionalities of those systems available to users of Windows client PCs.\footnote{The Microsoft judgment, para. 215.}

The Court finds that the concept of interoperability employed in the Commission’s decision – according to which interoperability between two software products means the capacity for them to exchange information and to use that information mutually in order to allow each of those software products to function in all the ways envisaged – is consistent with that envisaged in the Software Directive. The Court argues that the tenth recital of Directive 91/250 – whether in the English or the French version – does not lend itself to the ‘one-way’ interpretation advocated by Microsoft. Instead, interoperability implies a ‘two-way’
relationship in that it states that ‘the function of a computer program is to communicate and work together with other components of a computer system’.

7. DEFINITION OF THE RELEVANT MARKET AND FINDING OF DOMINANCE

7.1 Definition of relevant markets

The Court upholds the findings of the Commission as to the definition of relevant markets, which are as follows.

The first market defined in the Commission’s decision is the market for client PC operating systems. As regards the second market, the Commission’s decision defines work group server operating systems as operating systems designed and marketed to deliver collectively basic infrastructure services to relatively small numbers of client PCs connected to small or medium-sized networks. Both markets are found to have a worldwide dimension.

7.2 Finding of dominance

The Court upholds the finding of dominance in the market for client PC operating systems, which Microsoft itself had acknowledged. It points out the following factors that the Commission relied on to find dominance: Microsoft’s market shares are over 90 per cent, Microsoft’s market power has enjoyed an enduring stability and continuity and there are significant barriers to entry due to network effects. The Commission found that the dominant position presents extraordinary features in that Windows is not only a dominant product on the market for client PC operating systems but is, in addition, the de facto standard for those systems.

The Commission’s decision contains an interesting quote concerning the significance of network effects. In his testimony before the US District Court on 18 April 2002, Microsoft’s Chairman Bill Gates described this dynamic network effect:

Early on, [Microsoft] recognized that [...] more products became available and more information could be exchanged, more consumers would be attracted to the platform, which would in turn attract more investment in product development for the platform. Economists call this a ‘network effect’, but at the time we called it the ‘positive feedback loop’.

34 Ibid., at paras. 225-226.
35 Ibid., at paras. 23 and 25.
36 See the Commission’s decision, recital 429.
37 Ibid., at recital 451.
As to the Commission’s finding of dominance in the market for work group server operating systems, the Court points out that

the Commission takes issue with Microsoft for having used, by leveraging, its quasi-monopoly on the client PC operating systems market to influence the work group server operating systems market... In other words, Microsoft’s abusive conduct has its origin in its dominant position on the first product market... Even if the Commission were wrongly to have considered that Microsoft was in a dominant position on the second market ... that could not therefore of itself suffice to support a finding that the Commission was wrong to conclude that there had been an abuse of a dominant position by Microsoft.\footnote{38}

8. IS MICROSOFT’S INTEROPERABILITY INFORMATION PROTECTED BY INTELLECTUAL PROPERTY RIGHTS?

Microsoft argued that the communication protocols to be supplied are protected by intellectual property rights, namely by patents and by copyright. Moreover, the communication protocols should be protected as valuable trade secrets.\footnote{39}

The Commission confirmed, in answer to one of the written questions put by the Court, that its decision did not establish that the interoperability information was not covered by a patent or by copyright or, on the contrary, that it was. The Commission asserted that there was no need to decide that issue since, in any event, ‘the conditions for finding an abuse and for imposing the remedy [prescribed by Article 5 of the contested decision] were satisfied whether or not the information is protected by any patent or copyright’.\footnote{40}

The Court finds that the legal assessment of the Commission’s decision concerning the supply of interoperability information

must proceed on the presumption that the protocols in question, or the specifications of those protocols, are covered by intellectual property rights or constitute trade secrets and that those secrets must be treated as equivalent to intellectual property rights.

The central issue to be resolved in this part of the plea therefore is whether, as the Commission claims and Microsoft denies, the conditions on which an undertaking in a dominant position may be required to grant a licence covering its intellectual property rights are satisfied in the present case.\footnote{41}

\footnote{38} The Microsoft judgment, para. 559. 
\footnote{39} Ibid., at paras. 270-273. 
\footnote{40} Ibid., at para. 288. 
\footnote{41} Ibid., at paras. 289-290.
9. **Are the criteria established in the IMS Health case law applicable to the supply of interoperability information?**

Both the Court and the Commission reached the same result, namely that Microsoft has to supply the interoperability information in question. Moreover, both the Court and the Commission share the view that the Microsoft case is about the leveraging of a dominant position in one market (client PC operation systems) into an adjacent market (work group server operating systems). However, the overall structure of the Court's and the Commission's legal assessment is, as will be set out in this section, quite different.

The Commission had stated in its decision that

on a general note, there is no persuasiveness to an approach that would advocate the existence of an exhaustive checklist of exceptional circumstances and would have the Commission disregard a limine other circumstances of exceptional character that may deserve to be taken into account when assessing a refusal to supply.\(^{42}\)

The Commission therefore argued that the supply of interoperability information should not automatically be assessed against the criteria established by the IMS Health case law.\(^{43}\)

The Court reports that, at the hearing, the Commission had confirmed that it had based its decision on the following three exceptional circumstances:

The first consists in the fact that the information which Microsoft refuses to disclose to its competitors relates to interoperability in the software industry, a matter to which the Community legislature attaches particular importance. The second characteristic lies in the fact that Microsoft uses its extraordinary power on the client PC operating systems market to eliminate competition on the adjacent work group server operating systems market. The third characteristic is that the conduct in question involves disruption of previous levels of supply.\(^{44}\)

The Court disagrees with the Commission and states the following:

In the light of the foregoing factors, the Court considers that it is appropriate, first of all, to decide whether the circumstances identified in Magill and IMS Health ... are also present in this case. Only if it finds that one or more of those circumstances are absent will the Court proceed to assess the particular circumstances invoked by the Commission...\(^{45}\)

\(^{42}\) The Commission’s decision, recital 555.
\(^{43}\) The Microsoft Judgment, para. 301.
\(^{44}\) Ibid., at para. 317.
\(^{45}\) Ibid., at para. 336.
The final result of the Court’s legal assessment is that ‘the exceptional circumstances identified by the Court of Justice in Magill and IMS Health were also present in the present case.\textsuperscript{46} Hence, it is not necessary for the Court to consider the specific exceptional circumstances identified by the Commission.

The Court sets out that the test following from the Magill and IMS Health case law contains the following four steps:

(i) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;
(ii) the refusal is of such a kind as to exclude any effective competition on that neighbouring market;
(iii) the refusal prevents the appearance of a new product for which there is potential consumer demand; and
(iv) once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 EC unless the refusal is objectively justified.\textsuperscript{47}

10. **The Court’s Application of the Four IMS Health Conditions for Abuse**

The Court’s application of the four Magill/IMS Health conditions will be briefly set out in the following sections.

10.1 **The Indispensable Nature of the Interoperability Information**

It should first be noted that the Court emphasises that the Commission’s analysis ‘is based on complex economic assessments and that, accordingly, it is subject to only limited review by the Court’.\textsuperscript{48}

The Court holds that interoperability has two indissociable components: client-server operability and server/server interoperability.\textsuperscript{49} It thus confirms the Commission’s two-way approach to interoperability as set out in section 6.4 above.

The Court concludes

that Microsoft has not established that the Commission made a manifest error when it considered that non-Microsoft work group server operating systems must be capable of interoperating with the Windows domain architecture on an

\textsuperscript{46} Ibid., at para. 712.
\textsuperscript{47} Ibid., at paras. 332 and 333.
\textsuperscript{48} Ibid., at para. 379.
\textsuperscript{49} Ibid., at para. 374.
equal footing with Windows work group server operating systems if they were
to be marketed viably on the market.  

Moreover, the Court concludes

that the absence of such interoperability with the Windows domain architec-
ture has the effect of reinforcing Microsoft’s competitive position on the work
group server operating systems market, particularly because it induces con-
sumers to use its work group server operating system in preference to its
competitors’, although its competitors’ operating systems offer features to
which consumers attach great importance.  

10.2 Elimination of competition

The Court states that, in its decision, the Commission analysed

together the circumstance that interoperability is indispensable and the fact that
the refusal is likely to eliminate competition... Its analysis has four parts. In
the first place, the Commission examines the evolution of the work group
server operating systems market... In the second place, it establishes that in-
teroperability is a factor which plays a determining role in the use of Windows
work group server operating systems... In the third place, it states that there
are no substitutes for disclosure by Microsoft of the interoperability infor-
mation... In the fourth place, it makes a number of observations about the
[Communications Protocols Licensing Program].

The Court states that it

will examine in the following order the four categories of arguments which
Microsoft puts forward in support of its contention that the circumstance relat-
ing to the elimination of competition is not present in this case: first, the
definition of the relevant product market; second, the method used to calculate
market shares; third, the applicable criterion; and, fourth, the assessment of the
market data and the competitive situation.  

The result of the Court’s analysis is that ‘the circumstance that the refusal at
issue entailed the risk of elimination of competition is present in this case’. As
mentioned above, the Court upholds the Commission’s findings with regard to the

50 Ibid., at para. 421.
51 Ibid., at para. 422.
52 Ibid., at para. 565.
53 Ibid., at para. 479.
definition of the relevant market and the findings of dominant position. Moreover, the Court upholds the Commission’s findings as to the competitive situation.

As to the applicable criterion, it is interesting to note that Microsoft had argued that the Commission’s criterion of risk of the elimination of competition is not sufficiently strict since the Commission must demonstrate that the refusal to license an intellectual property right to a third party is ‘likely to eliminate all competition’ or, in other words, that there is a ‘high probability’ that the conduct in question will have such a result.

The Court very explicitly dismisses Microsoft’s reasoning by stating the following:

The Court finds that Microsoft’s complaint is purely one of terminology and is wholly irrelevant. The expressions ‘risk of elimination of competition’ and ‘likely to eliminate competition’ are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.\(^{54}\)

10.3 The new product

The Court reaches the conclusion

that the Commission’s finding to the effect that Microsoft’s refusal limits technical development to the prejudice of consumers within the meaning of Article 82(b) EC is not manifestly incorrect. The Court therefore finds that the circumstance relating to the appearance of a new product is present in this case.

Some elements of the Court’s reasoning should be highlighted. The Court first states that the fact that Microsoft’s conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in ‘limiting production, markets or technical developments to the … prejudice of consumers’.\(^{55}\)

\(^{54}\) Ibid., at para. 561.

\(^{55}\) Ibid., at para. 55.
According to the Court,

[The] circumstance relating to the appearance of a new product, as envisaged in Magill and IMS Health, ... cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development. 56

The core of the Court's legal reasoning is well summarised in the following two paragraphs:

[The] contested decision rests on the concept that, once the obstacle represented for Microsoft's competitors by the insufficient degree of interoperability with the Windows domain architecture has been removed, those competitors will be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, will be distinguished from those systems with respect to parameters which consumers consider important...

Nor would Microsoft's competitors have any interest in merely reproducing Windows work group server operating systems. Once they are able to use the information communicated to them to develop systems that are sufficiently interoperable with the Windows domain architecture, they will have no other choice, if they wish to take advantage of a competitive advantage over Microsoft and maintain a profitable presence on the market, than to differentiate their products from Microsoft's products with respect to certain parameters and certain features. It must be borne in mind that, as the Commission explains at recitals 719 to 721 to the contested decision, the implementation of specifications is a difficult task which requires significant investment in money and time. 57

10.4 The absence of objective justification

10.4.1 The mere existence of intellectual property rights does not constitute any objective justification

Microsoft's main argument was that the refusal to supply the interoperability information was objectively justified by the intellectual property rights that it holds over the 'technology' concerned. Microsoft asserted that it had made

56 Ibid., at para. 647.
57 Ibid., at paras. 656, 658.
significant investments in designing its communication protocols and that the commercial success its products have achieved represents the just reward.\textsuperscript{54}

In response, the Court first notes

that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.\textsuperscript{55}

The Court states that

even on the assumption that it is correct, the fact that the communication protocols covered by the contested decision, or the specifications for those protocols, are covered by intellectual property rights cannot constitute objective justification within the meaning of \textit{Magill} and \textit{IMS Health}, paragraph 107 above. Microsoft’s argument is inconsistent with the \textit{raison d’être} of the exception which that case law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case law could never apply. In other words, a refusal to license an intellectual property right could never be considered to constitute an infringement of Article 82 EC even though in \textit{Magill} and \textit{IMS Health} ... the Court of Justice specifically stated the contrary.\textsuperscript{56}

The Court then clarifies that

the Community judicature considers that the fact that the holder of an intellectual property right can exploit that right solely for his own benefit constitutes the very substance of his exclusive right. Accordingly, a simple refusal, even on the part of an undertaking in a dominant position, to grant a licence to a third party cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only when it is accompanied by exceptional circumstances such as those hitherto envisaged in the case law that such a refusal can be characterised as abusive and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property

\textsuperscript{54} Ibid., at para. 666.
\textsuperscript{55} Ibid., at para. 688.
\textsuperscript{56} Ibid., at para. 690.
right by requiring him to grant licences to third parties seeking to enter or remain on that market.\textsuperscript{61}

Moreover, the Court finds that ‘Microsoft, which bore the initial burden of proof ... did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate.’\textsuperscript{62}

10.4.2 \textit{The Commission did not introduce a new balancing of incentives test}

The Commission’s decision contains the following passage:

[A] detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft’s incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft).\textsuperscript{63}

Microsoft argued that this passage constituted a new evaluation test, that is, one that was hitherto unknown in the case law.\textsuperscript{64} However, the Court finds that Microsoft’s submission is based on a misreading of the \textit{Microsoft} decision.\textsuperscript{65} In the Court’s view, it follows from the context that the Commission in fact did not propose any new balancing test at all.

The Court concludes that the Commission came to a negative conclusion as to the existence of any objective justification

but not by balancing the negative impact which the imposition of a requirement to supply the information at issue might have on Microsoft’s incentives to innovate against the positive impact of that obligation on innovation in the industry as a whole, but after refuting Microsoft’s arguments relating to the fear that its products might be closed ..., establishing that the disclosure of interoperability was widespread in the industry concerned ... and showing that IBM’s commitment to the Commission in 1984 was not substantially different from what Microsoft was ordered to do in the contested decision ... and that its approach was consistent with [the Software Directive].\textsuperscript{66}

\textsuperscript{61} Ibid., at para. 691.
\textsuperscript{62} Ibid., at para. 697.
\textsuperscript{63} The Commission’s decision, recital 783.
\textsuperscript{64} The \textit{Microsoft} judgment, para. 704. For an analysis of this test, see Simonetta Vezzoso, “The Incentives Balance Test in the EU Microsoft Case: A Pro-Innovation Economics-Based Approach?”, \textit{27 ECLR} (2006) p. 382.
\textsuperscript{65} The \textit{Microsoft} judgment, para. 704.
\textsuperscript{66} Ibid., at para. 710.
11. **Analysis and Conclusions**

11.1 **Major novelty of the judgment: the new product condition *de facto* replaced by a new or improved product test**

Both the Court and the Commission left the issue open whether Microsoft’s interoperability information was protected by intellectual property rights or not. For the purpose of legal reasoning, both assumed that the information was protected by intellectual property rights. The Court states that this assumption benefits Microsoft because the test whether a dominant firm shall be subject to mandatory licensing is more beneficial to Microsoft than the test whether a dominant firm has to give access to an essential facility not protected by intellectual property rights. The Court explicitly mentions that, according to the *Magill/IMS Health* case law, the difference between the two tests consists in the new product condition that has to be fulfilled only if an essential facility is protected by intellectual property rights.67

In order for the new product condition to have any practical significance, it should in my view reasonably be interpreted as representing some additional requirement compared to the ‘limiting production, markets or technical development to the prejudice of consumers’ stipulated by Article 82(b) of the Treaty.

The Court’s reasoning that the new product condition ‘falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in “limiting production, markets or technical developments to the … prejudice of consumers”’68 is therefore not very convincing.

It seems that the competing server operating systems are on the same product market as Microsoft’s. At the same time, it is quite clear that the competing server operating systems do offer some at least slightly different features. But are these somewhat different features so significant that the competing group server operating systems reasonably could be characterised as new products? I cannot find any explicit analysis of this issue in the *Microsoft* judgment.

Instead, the Court seems to take some kind of short-cut and simply states that the new product condition is fulfilled because Microsoft’s conduct limits technical development. The Court asserts that in doing so it simply applies the earlier *Magill/IMS Health* case law. I am not convinced by the logic of the Court’s reasoning in this respect. To me, it would have been more straightforward to explicitly admit that the Court reverses earlier case law by skipping or, at the very least, substantially modifying the new product condition. In fact, after the *Microsoft* judgment, it would be misleading to use the term ‘new product condition’. It would be much more appropriate to use the expression ‘new or improved

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67 See ibid., at para. 334.
68 Ibid., at para. 55.
product condition'. In my view, the major novelty of the judgment therefore is that the new product condition from the Magill/IMS Health case law has de facto been replaced by a new or improved product test.

However, I do agree with the Court's findings, which imply that, from a practical perspective, it would not really matter whether Microsoft's interoperability information is protected by intellectual property rights or not. The new product condition as interpreted by the Court in fact appears to be devoid of any practical significance for the intellectual property right holder in situations where competitors use improved quality as a parameter of competition.69

I do think that the Court is right to push back the scope of the privilege accorded to holders of intellectual property rights and bring the antitrust treatment of intellectual property rights more in line with the antitrust treatment applied to property rights concerning physical assets. The following passage from the US Microsoft case is quite interesting in this regard.

Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes... That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability.70

In my view, the Microsoft judgment thus represents a significant legal novelty, and Microsoft would, in principle, have had good arguments for the Court not to impose any fine at all in view of the novelty of the Court's legal assessment of intellectual property rights under EU antitrust law. This would have been the case if the Magill/IMS Health case law was the only thing on which Microsoft could have based its self-assessment of the compatibility of its conduct with Article 82. Relying exclusively on Magill,71 it would have been reasonable for Microsoft to take for granted that, even as a dominant firm, it could continue to compete aggressively and disregard any special responsibility of a dominant firm, on the cumulative conditions that: (i) the refusal to supply information was protected by intellectual property rights; and (ii) the refusal would not prevent the appearance of a new product. Whether technical development would be limited would have

69 However, the new product condition may still have some practical significance in cases where competitors want to compete only by selling an identical product at lower prices. On the erosion of the new product condition, see Alexandros Stehlik, 'Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine', 27 ECLR (2006) p. 434 at p. 440.
70 U.S. v. Microsoft Corp., 253 F.3d 34, 63 (Fed. Cir. 2001). As to the conflict between intellectual property rights and competition law, see for example Hans Henrik Lidgard and Jeffery Artik, ed., The Intersection of IPR and Competition Law - Studies of Recent Developments in European and U.S. Law (University of Lund 2008).
71 It should be noted that the judgment in IMS Health was rendered some weeks after the Commission's Microsoft decision.
been of no legal significance as long as the two conditions mentioned were fulfilled.

However, as I will discuss in the next section, there were other exceptional circumstances present that, taken together, would have made it quite obvious that Microsoft’s conduct would be contrary to Article 82.

11.2 The truly exceptional circumstance of the case: the nature of the interoperability information

In the Magill case, preventing the appearance of a new product was a really exceptional circumstance that made mandatory licensing an appropriate remedy. In the present Microsoft case, I believe that the truly exceptional circumstance lies in the nature of the interoperability information.72

Simply speaking, I do not believe that making it more difficult for competing products to interoperate with the products of the dominant firm is a legitimate competitive strategy. Moreover, in the present case, the 1991 Software Directive explicitly stipulates that the authorisation of the holder of a copyright over a computer program may not be required for the decompilation of parts of that program, where this is ‘indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs’.73

Thus, already in 1991, the EU legislator made clear that even non-dominant firms would not be allowed to rely on intellectual property rights to prevent other firms from obtaining the necessary information for achieving interoperability by reverse-engineering. Against this background, the step is rather small and quite logic to demand from dominant firms not only to be passive but to actively provide interoperability information.

I therefore believe that knowledge of the EU legislator’s view on the nature of interoperability information as set out by the Software Directive should have enabled Microsoft to ascertain by way of self-assessment that the firm’s conduct would be likely to be seen by the Court as infringing Article 82 EC.

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72 For a discussion of this aspect, see Erik Sandgren, "Tvångsilenser – sämst iom värdefulla immateriella rättigheter", Master Thesis, University of Stockholm, Prof. Marianne Levin (supervisor) (2006) section 9.1.3. See also the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses of December 2005, which in section 9.2.3 concerning the refusal to supply information needed for interoperability states: ‘Even if [information needed for interoperability] may be considered a trade secret it may not be appropriate to apply to such refusals to supply information the same high standards for intervention as those described in the previous subsection [on refusal to license intellectual property rights in general].’

73 Art. 6 of the Software Directive.
11.3 The risk of collusion by spill-over effects

Normally, antitrust authorities have good reasons to worry about too much cooperation between competitors, which can easily entail anti-competitive effects. So what should we think about the following statement concerning cooperation between Microsoft and one of its biggest competitors, Sun?

‘Over the past year we have worked to establish great communication at all levels between our companies, from regular executive meetings to in-depth working sessions with our engineers,’ said [Microsoft CEO Steve] Ballmer. ‘In the first year, we’ve moved from the courtroom to the computer lab. Now we’re moving from the lab to the market.’

As I believe that interoperability information is not a legitimate parameter of competition, I do not see any direct competition problems, as opposed to information exchange concerning sensitive competition parameters such as price and production cost.

However, I think that antitrust authorities should be well aware of the risk of harm to competition that arises in circumstances like the present. If competitors meet to discuss detailed interoperability issues, there is obviously a risk that such meetings could have a spill-over effect and entail some kind of cooperation in areas where antitrust authorities would prefer tough competition and no cooperation at all between competitors.

However, I believe that the risks should not be overestimated. The present case could be described as a very special type of standardisation process. It is based on Microsoft supplying information on its de facto industry standard interface. There are similar risks inherent in all kinds of standardisation contacts between competitors. Thus, I believe that the risks in question are not of such a magnitude as to question the wisdom of ordering mandatory supply of interoperability information.

11.4 Is the Microsoft judgment an example of a ‘more economic approach’ to Article 82?

The Commission adopted its Microsoft decision in March 2004. The following year, in December 2005, the Commission published its ‘DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses’. The ambition of the Commission is to move to a ‘more economic approach’ when assessing potential cases of abuse. Against this backdrop, it may be interesting

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75 For a critical assessment of a ‘more economic approach’ under Article 82 EC, see Meinrad Dehler and Michael Adam, ‘Abuse of Dominance under Reform – Sound Economics and
to ask to what extent the Commission’s Microsoft decision can be said to encompass a more economic approach.

I believe that the Commission’s decision is a good example of a more economic approach in many aspects. The Commission has undertaken an impressive effort in not only formulating theories of harm but also market testing them. However, it is interesting to note that, in several respects, the Court’s judgment can be said to be ‘less economic’ than the Commission’s decision.

One example consists in the Commission assertion that

on a general note, there is no persuasiveness to an approach that would advocate the existence of an exhaustive checklist of exceptional circumstances and would have the Commission disregard a limite other circumstances of exceptional character that may deserve to be taken into account when assessing a refusal to supply.76

The Commission thus stresses the need for a more case-by-case approach in which the specific economic circumstances of a specific case are taken into account. However, as set out in section 9 above, the Court chose to follow a more schematic path by applying the conditions set out in earlier case law.77

Another example consists in what appeared to be the Commission’s balancing of the innovation incentives test as set out in section 10.4 above. In fact, the Court did not evaluate this new test but declared instead that, when seen in its context, the Commission did not mean to establish such a test at all. Obviously, a test involving the balancing of Microsoft’s incentives to innovate against the competitors’ incentives to innovate would have amounted to a very advanced ‘more economic approach’.

A more economic approach is often associated with the competition policy advocated by the influential Chicago School of Antitrust Analysis, as opposed to the traditional ordoliberal approach of EU competition law, which is more or less regarded by many American and European antitrust practitioners as a relic of the past that should be disposed of.78

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77 The Commission’s decision, recital 555.

78 As pointed out in section 11.1, I am not very convinced by the Court’s treatment of the new product condition. Instead of applying that condition, I believe that the Court in fact set this condition aside or at least significantly modified it.

Case Note – The Microsoft Judgment

It is therefore interesting to note that the Court’s judgment contains several passages upholding the traditional ordoliberal approach to EU competition law. An interesting example is the following passage:

Last, it must be borne in mind that it is settled case law that Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure (Case 85/76 Hoffmann-La Roche v. Commission [1979] ECR 461, paragraph 125, and Irish Sugar v. Commission, … paragraph 232). In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.79

Moreover, it is interesting to note that the Court refers to the buzz word of ordoliberalism, ‘free competition’ as the raison d’être for competition law to prevail over intellectual property rights.80

One of the main differences between the ordoliberal approach and the Chicago School concerns the extent to which less efficient competitors should be protected from the dominant and more efficient firm. According to the Chicago School, less efficient companies should not be protected, whereas according to the ordoliberal approach this may sometimes be necessary in view of protecting the competitive process.81

However, as far as I understand the facts of the present case, the Court’s judgment was probably motivated both on ordoliberal grounds as well as on ‘more economic’ grounds as advocated by the Chicago School.82 The reason for this is that Microsoft’s conduct would be likely to eliminate competition not only from less efficient competitors but also from more efficient producers of work group server operating systems. The present case is therefore not only about leveraging market power from one market to another; it is also about competition authorities promoting competition on the merits as opposed to competition based

79 The Microsoft judgment, para. 664.
80 This may correspond to the German expression Wettbewerbsfreiheit. However, there was no official German language version of the Microsoft judgment available when this article was written. The official French language version of the Microsoft judgment refers to libre concurrence.
81 The Microsoft judgment, para. 690.
on artificial advantages inherent to a dominant position. This aspect is very well summarised in the following passage from the Court’s judgment:

[T]he Commission was correct to consider that the artificial advantage in terms of interoperability that Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features, to the prejudice, notably, of consumers... That refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned, particularly with regard to parameters such as security, reliability, ease of use or operating performance speed...^4

11.5 Recent and future developments

It is clear that losing the Microsoft case would have dealt a severe blow to the Commission’s credibility in enforcing complex cases of abusive conduct. As a result of the Commission’s impressive Court victory against Microsoft and several of Europe’s most outstanding competition lawyers contracted by Microsoft, the Commission will instead benefit from considerable self-confidence in this area of competition law enforcement. One very interesting area to monitor is the emergence of the Commission’s policy as to a new more economic approach to cases of abuse of a dominant position.

An indication of the Commission’s growing self-confidence in proactive antitrust enforcement in the computer and software industry is that, on 14 January 2008, the Commission initiated two new formal investigations against Microsoft for suspected abuse of a dominant market position. One of the two cases is in the field of interoperability in relation to a complaint by the European Committee for Interoperable Systems. The second area where proceedings have been opened is in the field of tying in separate software products, following *inter alia* a complaint by Opera, a competing browser vendor.^5

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^4 The Microsoft judgment, para. 653.
APPENDIX B: SECOND LICENTIATE ARTICLE

'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective'

Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective

ROBERT MOLDÉN*

I. Introduction

A. Introduction to the EU – Framework of Regulation 1/2003

In her book, *Co-operation between National Competition Agencies in the Enforcement of BC Competition Law*, Silke Brammer gives the following introduction which is also very well suited to serve as an introduction to the present chapter:

In 2004, European competition law underwent the most radical reform since its conception. The changes that this reform involved were so significant that it has been described as a 'legal and cultural revolution'. The centerpiece of the reform, commonly referred to as 'modernisation', is Regulation No 1/2003 on the implementation of Articles [101] and [102] TFEU, which entered into force on 1 May 2004. Regulation 1/2003 has brought about a fundamental reorganisation of the division of responsibilities between the European Commission, the national competition authorities (NCAs) and the courts of the Member States of the European Union. It is said to entail a decentralisation of the enforcement of EC competition law.

Regulation 1/2003 has in fact established a system of full parallel competences in which the Commission, the NCAs and the courts of the Member States share the responsibility to enforce the EC competition rules. Shared competences and 'decentralised' application of EC competition law through a multitude of enforcers (instead of one central body – the Commission) makes it necessary that the numerous enforcement bodies collaborate and coordinate their action in order to avoid conflicts and to ensure the efficient and consistent application of the law.¹

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Another important development is the Commission’s ambition to foster private enforcement of EU competition law which so far, as opposed to the situation in the US, has played a rather modest role in the EU. In its White Paper on Damages actions for breach of the EC antitrust rules the Commission states the following:

Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, to date in practice victims of EC antitrust infringements only rarely obtain reparation of the harm suffered. The amount of compensation that these victims are forgoing is in the range of several billion euros a year.

By moving from a system of a rather centralised application of EU competition law by a single authority – the Commission – to a system of parallel application of EU competition law by national competition authorities and national courts, the scope for conflicts of laws and jurisdictional issues have significantly increased within the ambit of private enforcement of EU competition law. Most chapters of the present book focus on these issues, which are within the classical domains of private international law.

However, even though national courts and competition authorities are still free, in principle, to apply national procedural law, Regulation 1/2003 imposes strict limitations as to applying national competition law in cases where trade between Member States may be affected. Where national competition authorities and courts apply national competition law to agreements and concerted practices which may affect trade between Member States, they shall also apply Article 101 TFEU. Where the national competition authorities or courts apply national competition law to any abuse prohibited also by Article 102 TFEU, they shall also apply Article 102 TFEU. The application of national competition law may not lead to the prohibition of agreements or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) TFEU, or which fulfil the conditions for exemption under Article 101(3) TFEU.

In order to prevent the decentralisation of the application of EU competition law from leading to a significant loss of coherence in uniform application of substantive EU competition law, Regulation 1/2003 introduced a number of new coordination measures, which are the subject of this chapter.

Since May 2004, the Commission is entitled, acting on its own initiative, to submit written amicus curiae observations on the application of EU competition law to national courts where the coherent application of EU competition law so requires. National competition authorities are entitled to submit such written amicus curiae observations irrespective of whether the coherent application of EU competition law so requires. National courts on their side are entitled to ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competi-

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2 For an overview over recent developments in Swedish competition law as to private enforcement, see JH Lidgard, 'Konkurrensrättligt skadestånd' (2009) 94 Svensk Juristtidning 32. See also H Anderson and E Legnerfeld, 'Effective private enforcement: The Swedish experience, a lesson for the EU' (2009) Concurrences 156.


4 See Art 3 Regulation 1/2003.

5 Art 15(3) Regulation 1/2003, see III below.
tion rules. In order to enable the Commission to monitor national court proceedings where EU competition law is applied, Member States are obliged to forward to the Commission a copy of any written judgment of national courts applying EU competition law.

These new powers do not affect the pre-existing right of national courts to make references for a preliminary ruling on the interpretation of EU competition law to the Court of Justice under Article 267 TFEU.

This chapter is titled 'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective'. The chapter will thus present the different coordination measures envisaged in Regulation 1/2003 and Article 267 TFEU to foster the coherent application of EU competition law. The chapter will then try to analyse how well these measures have been working in practice by looking at concrete examples of their application. Moreover, part VII.B contains an overview over the legislative history of the coordination measures now embodied in Article 15 Regulation 1/2003. The ultimate objective of this chapter is to come up with some concrete proposals on how to improve the effectiveness of the system. These proposals – which concern both potential amendments to Regulation 1/2003 as well as potential amendments of national competition law – are summarised in the Policy Proposals.

Ideally, this chapter would look at how the system is applied in all the 27 Member States. However, for practical reasons, I have decided to focus on the one Member State whose legal system I am most familiar with, that is Sweden. This delimitation enables me to make a comprehensive study of all cases where the coordination system embodied in Regulation 1/2003 and Article 267 TFEU has been applied in practice in Sweden, which has been a Member State of the European Union since 1995.

However, before looking at how the coordination system embodied in Regulation 1/2003 and Article 267 TFEU has been applied in Sweden, it will be helpful first to briefly introduce the Swedish system of competition law enforcement, which is the object of the following subsection.


The new Swedish Competition Act of 2008 contains provisions prohibiting anticompetitive agreements and abuse of a dominant position which constitute copies of Articles 101 and 102 TFEU. According to the travaux préparatoires behind the preceding Competition Act, the fact that the substantive provisions of the Swedish Competition Act are in line with those of EU competition law means that the Commission practice and jurisprudence of the Court of Justice can serve as guidance when interpreting the Swedish Competition Act.

6 Art 15(1) Regulation 1/2003, see IV and V below.
7 Art 15(2) Regulation 1/2003, see VI below.
8 The text of this subsection is taken from subsection 1.1 of my Swedish National Report for the UDC Bordeaux Congress 2010 on 'Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?'.
The Swedish Supreme Court has recently, in a case concerning the existence of a dominant position, concluded that the substantive provisions of Swedish competition law are in line with the corresponding provisions of EU competition law to such a degree that it in fact does not matter whether Swedish or EU competition law is applied, in practice the analysis to be effected is the same.

Public enforcement of Swedish competition law is entrusted to the Swedish Competition Authority (SCA) and its approximately 130 employees. There are five operational departments. Competition law departments 1–3 handle competition law cases in the private sector, competition law department 4 handles competition law cases in the public sector. In September 2007, the activities of the former Public Procurement Authority were transferred to a new-founded Department of Public Procurement at the SCA.

In the majority of cases handled by the SCA, the procedure is very similar to that of the Commission’s DG Competition and to that of most of other national competition authorities in the EU. The SCA is entitled to take both final and interim injunction decisions on its own, ordering an ongoing violation of Swedish or EU competition law to be terminated; such decisions can be combined with a penalty to be paid in case the antitrust offender would not comply with the injunction decision. Moreover, the SCA is entitled to take decisions making voluntary commitments mandatory, under threat of penalty payments. The Authority is also entitled to issue fine orders. These decisions by the SCA can be appealed to the Swedish Market Court. An appeal against the judgment of the Swedish Market Court to the Swedish Supreme Court is not permitted, the Swedish Market Court is thus first and last court instance in the majority of cases when Swedish competition law is enforced by the SCA.

However, a peculiarity of Swedish procedural competition law consists in the fact that the SCA may not take any decision on its own to impose fines for breaches of Swedish or EU competition law. Moreover, the SCA is not entitled to take any decisions on its own prohibiting a merger. In these cases, the SCA has to sue the undertakings involved before the District Court of Stockholm. It is thus the District Court of Stockholm which, if the SCA wins its case, imposes fines or prohibits a merger in first instance. Also in these cases, there is only one more instance, as the judgments of the Stockholm District Court can be appealed to the Swedish Market Court, without any appeal to the Swedish Supreme Court being possible.

The current procedural system has recently been criticised by jur dr Eva Edwardsson of Uppsala University, who in a report commissioned by the SCA suggests that the Swedish procedural peculiarities in this respect should be abolished and be brought in line with the EU procedural system; under such a reformed system proposed by Eva Edwardsson, the

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12 Judgment of the Swedish Supreme Court of 19 February 2008 in Case T 2806-05 Dansk stenalgen genom Bornholms Trafikken v Ystad Hamn Logistik Aktiebolag (Ystad Harbour); this case is presented below (IV.B). A similar statement has been made by the Swedish Market Court in its judgment in Case A 6/06, MD 2007:26 of 15 November 2007 Överarned kommun and others v Elberos Kraft AB and others, see IV.B below.

13 Konkurrensvetenskap.

14 Nämnden för offentlig upphandling (NOU).

15 c 3 Art 1 and 3 Swedish Competition Act.

16 c 3 Art 1 read together with c 6 Art 1 Swedish Competition Act.

17 c 3 Art 17 Swedish Competition Act; if the undertaking to which the fine order is addressed does not consent to the order within the time specified, the Swedish Competition Authority may initiate court proceedings concerning fines instead.

18 Marknadsdomstolen, www.marknadsdomstolen.se; see c 7 Art 1 Swedish Competition Act.
SCA would also take decisions on fines and merger prohibitions on its own, these decisions could then be appealed to a number of administrative courts.\(^{20}\)

When it comes to private enforcement, objections of nullity of anti-competitive agreements can be raised at civil litigation proceedings before one of the 48 Swedish district courts where the defendant is domiciled. Private actions for damages because of infringement of Swedish or EU competition law may also be raised before one of these 48 district courts. Moreover, the Stockholm District Court is always competent to handle such claims.\(^{21}\) Claims for damages can either be handled in a separate proceeding or jointly processed with an ongoing public enforcement claim for fines before the Stockholm District Court.\(^ {22}\) Judgments of district courts can be appealed to one of the courts of appeal whose judgments in turn can be appealed to the Swedish Supreme Court.

Another peculiarity of Swedish competition procedural law is that private injunction applications to cease any ongoing infringement of Swedish or EU competition law may not be brought directly to court. First, a complaint has to be made to the SCA. If the SCA decides to pick up the case, the Authority would take an injunction decision, which then could be appealed to the Swedish Market Court; in these proceedings, the complainant does not enjoy any standing as a party. If, however, the SCA decides not to pursue the case, the complainant obtains a so-called subsidiary right of action and they can directly lodge its case with the Swedish Market Court which may then, as first and last instance, take an injunction decision.\(^ {23}\)

In summary, in all cases concerning the public enforcement of Swedish and EU competition law, the SCA deals only with two courts: the Stockholm District Court, which has a department specialised in competition law cases; and the Swedish Market Court, which is either the first and only or the second and last instance in these cases.

When it comes to private enforcement of Swedish and EU competition law in Sweden, there is only one court involved in first and last instance, the Swedish Market Court, provided the case concerns a claim for an injunction decision to cease ongoing infringements of competition law. However, claims of nullity or claims for damages can be made not only before the Stockholm District Court, which is the only Swedish district courts employing judges specialised in competition law, but also before the other 47 district courts which mostly lack any expert knowledge in competition law.

II. The Right of National Courts to Request a Preliminary Ruling from the Court of Justice in Competition Law Cases

A. General Observations on Preliminary Rulings by the Court of Justice

As mentioned above, the new coordination measures introduced by Article 15 Regulation 1/2003, which are the main subject of this chapter, do not affect the right and/or duty of


\(^{21}\) c 3 Art 26 Swedish Competition Act.

\(^{22}\) c 8 Art 7 Swedish Competition Act.

\(^{23}\) c 3 Art 2 Swedish Competition Act.
national courts under Article 267 TFEU to make a reference for a preliminary ruling on the interpretation of Treaty provisions such as Articles 101 and 102 TFEU. As to preliminary rulings, only the following few remarks will be made.

From the perspective of the national judge a major advantage of preliminary rulings consists in obtaining authoritative – and binding – guidance on how to interpret EU competition law. The major drawback consists in the considerable prolongation of the overall court procedure as it takes considerable time for the Court of Justice to produce a preliminary ruling. This is still the case today, even if the Court of Justice has successfully managed to reduce considerably the average time used for preparing a preliminary ruling to approximately 15–16 months.24

B. Swedish Courts’ Requests for a Preliminary Ruling from the European Court of Justice in Competition Law Cases

During the first 14 years of Sweden’s EU membership, from 1995 to 2009, Swedish courts made references for a preliminary ruling to the Court of Justice in 67 cases, i.e. on average five cases per year.25 In the area of public procurement and EU State Aid law not a single reference for a preliminary ruling has been made by a Swedish court so far. In the area of competition law, Swedish courts have made references for a preliminary ruling in two cases, which will be presented below.26

i. The STIM Case

This was the very first time the Swedish Market Court made a reference for a preliminary ruling to the Court of Justice in a competition law case. The case is an example of private enforcement of EU competition law in Sweden. In October 2004, two commercial broadcasting companies, Kanal 5 and TV 4, brought an application for an injunction before the SCA, on the grounds that STIM abused its dominant position. STIM is a collecting society which enjoys a de facto monopoly in Sweden on the market for making copyright-protected music available for television broadcasting. By decision of 28 April 2005, the SCA dismissed the application on the ground that insufficient grounds existed to justify the opening of an investigation. Kanal 5 and TV 4 then used their subsidiary right of action and brought an action before the Swedish Market Court, which decided to stay the proceedings and to make a reference for a preliminary ruling to the Court of Justice.

In its judgment of 11 December 2008, the Court of Justice, ruled as follows:

Art. 102 TFEU must be interpreted as meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate

25 ibid 492.
26 See U Bernitz, Föranställning av EU-domstolen – Svenska domstolens hållning och praxis (report commissioned by SIEPS, 2010).
increase in the costs incurred for the management of contracts and the supervision of the use of those works.

Article 102 TFEU must be interpreted as meaning that, by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified.27

It would of course have been very interesting to see how this preliminary ruling is implemented by the Swedish Market Court, in particular as this is the only preliminary ruling in a Swedish competition law case given by the Court of Justice so far. However, this will not be possible. In March 2010, STIM reached out of court settlements with both Kanal 5 and TV 4,28 which means that the Swedish Market Court no longer has to deliver any judgment in this case.

ii. The TeliaSonera ADSL Case

This was the second time a Swedish court made a reference for a preliminary ruling in a competition law case. As opposed to the above-mentioned STIM case, this is an example of public enforcement of Swedish and EU competition law. As set out in I.B above, the SCA is not entitled to make any decision on fines on its own, but must sue a defendant before the Stockholm District Court. On 21 December 2004, the SCA sued TeliaSonera before the Stockholm District Court, claiming fines of 144 million SEK for alleged abuse of a dominant position. According to the SCA, TeliaSonera abused its dominant position by applying price squeezes on the ADSL data communications market. On 30 January 2009, i.e. more than four years after the claim was lodged, the Stockholm District Court made a reference for a preliminary ruling to the Court of Justice, asking in total 10 questions on how to interpret the EU competition law on price squeezes.29 Oral pleadings took place on 18 March 2010 and the judgment of the Court of Justice is expected to be delivered during autumn 2010.

Hence, no Swedish court has yet had the occasion to implement a preliminary ruling from the Court of Justice in a competition law case. This means that it is not yet possible to evaluate how well preliminary rulings are implemented by Swedish courts in competition law cases.

27 Case C-52/07 Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättarens Internationella Musikbyrå (STIM)upa, judgment of 11 December 2008.
29 The reference for a preliminary ruling of 31 pages was written by Judge Ingeborg Simonsen, who holds a PhD in EU competition law. The case number at the Stockholm District Court is T 31862-04.
III. The Right of NCAs and the Commission to Submit Amicus Curiae Observations to National Courts in Competition Law Cases

A. General Points on Amicus Curiae Observations in Competition Law Cases

The right of NCAs and the Commission to submit amicus curiae observations is embodied in Article 15(3) of Regulation 1/2003, which reads as follows:

Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article [101] or Article [102 TFEU]. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article [101] or Article [102 TFEU] so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

Article 15(3) Regulation 1/2003 is complemented by provisions in the Commission Notice on the cooperation between the Commission and national courts, which provides the following information as to the procedural framework in which amicus curiae observations are to be submitted by the Commission:

34. Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.

35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles [101] and [102 TFEU]

(a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;
(b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness); and
(c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).30

By leaving the procedural details of the Commission's intervention to be determined by national rules on civil procedure, Regulation 1/2003 thus opens the way for considerable

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30 Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (Cooperation Notice) [2004] OJ C101/54, paras 34-35 (footnote omitted).
legal uncertainty. As pointed out by Silke Brammer, "It is therefore unclear whether the Commission, when acting as amicus curiae, must be considered an intervening party *sensu stricto*, an expert witness or a sort of advocate general, or whether it will have a legal status of its own. The classification of the Commission's assistance may have important procedural consequences.

Between May 2004 and December 2009, the Commission has only submitted amicus curiae observations on three occasions where the Commission considered that there was an imminent threat to the coherent application of the EU competition. None of these three amicus curiae observations were addressed to Swedish courts.

The first two amicus curiae filings, in the *Garage Gremeau* case and the case on tax deductibility of Commission Competition fines in the Netherlands are very well summarised in the Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy of July 2009.

### i. The Garage Gremeau Case

In 2006, the Commission for the first time made use of Article 15(3) by presenting written observations to the Paris Court of Appeal in the *Garage Gremeau* case concerning the interpretation of the concept of quantitative selective distribution in Regulation 1400/2002 (the 'Motor Vehicle Block Exemption Regulation'). The question of whether a car distribution system is selective and if so, whether the selection criteria are quantitative or qualitative in nature, has important legal and practical implications. Subject to compliance with other conditions, distribution agreements of car suppliers with a market share not exceeding 30 per cent benefit from the block exemption under Regulation 1400/2002. This threshold rises to 40 per cent for quantitative selective distribution agreements, while qualitative selective distribution agreements benefit from the block exemption irrespective of the market share of the supplier. Articles 1(1)(f)-(h) of the Motor Vehicle Block Exemption Regulation define selective distribution as being qualitative where the supplier selects distributors according to uniformly applicable and non-discriminatory criteria that are only qualitative in nature, are required by the nature of the goods (for example, to preserve its quality and ensure its proper use) and do not directly limit the number of authorised distributors. By contrast, in a quantitative selective distribution system, the supplier uses selection criteria that directly limit the number of authorised distributors.

The case at issue was brought by Garage Gremeau against DaimlerChrysler France which had terminated all of its existing distribution contracts with a view to restructuring its distribution system on the basis of quantitative selection, in light of Regulation 1400/2002. It refused to conclude a new distribution agreement with its former agreed distributor Garage Gremeau on the basis that it would exceed the number of distributors foreseen as it had appointed another distributor for the area in question. Garage Gremeau requested by way of remedy that it should be admitted to DaimlerChrysler's network. This was refused.

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31 Brammer, *Co-operation between National Competition Agencies* (n 1) 46.
at first instance and on appeal. The Cour de Cassation subsequently affirmed the appeal court's finding that DaimlerChrysler’s criterion of nominating a certain number of authorised distributors for different sales territories was objective and precise, but held that the lower court should have examined both the objectivity of its other selection criteria and how these were implemented, in particular because the new authorised distributor in Burgundy did not fulfil these at the time of its appointment. These judgments generated considerable interest in the sector, including in other Member States.

The Commission intervened to clarify that quantitative selective distribution systems do not have to fulfil the same requirements as those applicable for qualitative selective distribution systems, meaning that it is not necessary to assess the objectivity of the selection criteria other than those for determining the number of distributors. If that were the case, the categories of quantitative and qualitative selective distribution would be conflated, contrary to Regulation 1400/2002. With regard to any assessment of the implementation of the selection criteria, the Commission observed that there does not appear to be any basis in Regulation 1400/2002 for preventing a supplier from foreseeing a transitional period for fulfilling its requirements if it considers that a given candidate has the financial and technical potential. Otherwise, this would tend to limit access to existing authorised distributors who have already made the necessary investments, foreclosing more competitive newcomers. This case is currently subject to a stay of proceedings. Stakeholders have noted that the Commission’s intervention was very useful in that it could be invoked in similar proceedings before other national courts.

ii. The Case on Tax Deductibility of Commission Fines in the Netherlands

The Commission also decided to make observations pursuant to Article 15(3) Regulation 1/2003 in a case in the Netherlands concerning the tax deductibility of Commission competition fines. In the initial judgment of 22 May 2006 on this issue, the Dutch Rechtbank van Haarlem (Court of First Instance in Haarlem, notably in tax matters) ruled that fines imposed by the Commission for infringement of the EC competition rules are partially deductible from income tax. The court found that although Dutch law provides that administrative fines cannot be deducted from income tax, fines imposed by the Commission cannot be understood according to the national definition of 'fine' as, unlike fines imposed under Dutch law, they consist of punitive elements and elements intended to skim off illegal gains.

This judgment was appealed to the Gerechtshof te Amsterdam (Belastingkamer) (Court of Appeal of Amsterdam, tax chamber). The Commission moved to intervene as amicus curiae to highlight that Community fines for breach of the EU competition rules are not intended to skim off illegal gains and that the principle of equivalence would be breached if fines imposed under EU competition law could be deducted in contrast to fines under national law. Moreover, it would go against the principle of effectiveness, as the impact of Commission decisions would necessarily be reduced if companies fined for the violation of Articles 101 and 102 TFEU could (at least partially) deduct the amount from national income tax.

In an intermediary judgment of 12 September 2007, the Gerechtshof te Amsterdam decided to ask for a preliminary ruling to the European Court of Justice under Article 267 TFEU regarding the possibility for the Commission to intervene on the basis of Article 15(3) in such national (tax) litigation.
On 11 June 2009, the Court of Justice ruled that Article 15(3) Regulation 1/2003 must be interpreted as meaning that it permits the Commission of the European Communities to submit on its own initiative written observations to a national court of a Member State in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof imposed by the Commission for infringement of Articles [101] or [102 TFEU].

Following this judgment of the Court of Justice, the Commission submitted its amicus curiae observations before the Gerechtshof te Amsterdam. In its judgment of 11 March 2010, the Gerechtshof te Amsterdam set aside the judgment of the Rechtsbank van Haarlem. It held that fines imposed by the Commission are not deductible from taxes and thus followed the line suggested by the Commission in its amicus curiae observations.

iii. The Pierre Fabre Dermo-Cosmétique Case

In 2009, the Commission submitted written amicus curiae observations in the Pierre Fabre Dermo-Cosmétique case before the Paris Court of Appeal. The Commission’s observations relate to a restriction of online sales in selective distribution. They are summarised in the Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy 2009 of June 2010, paragraph 509, as follows:

The Commission observed that a general prohibition of on-line sales imposed by the supplier on its selected distributors is an infringement by object under Article [101](1) [TFEU], which is not block-exempted under Regulation 2790/1999. Moreover, the Commission observed that the notion of ‘objective justification’, mentioned in point 51 of the Guidelines on Vertical Restraints, should be interpreted strictly and shall not replace the analysis of efficiencies under Article [101] (3) [TFEU]. In general, only exceptional circumstances, external to the parties, may be considered as an objective justification for restrictions by object. If however the supplier proves that the conditions of Article [101](3) [TFEU] are fulfilled, the agreement may be individually exempted under that Article. On 29 October [2009], the Paris Court of Appeal referred to the EC a question for preliminary ruling under Article [267 TFEU].

In its Report on the functioning of Regulation 1/2003 from April 2009, the Commission states that stakeholders have called on the Commission to have greater recourse to the instrument of amicus curiae observations and that the Commission intends to reflect upon how this practice should further develop. In my view, there are probably good reasons for the Commission to use the instrument of amicus curiae observations more frequently, merely three amicus curiae observations in five and a half years is indeed a quite low figure.

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55 Case C-429/07 Inspecteur van de Belastingdienst v X BV, judgment of 11 June 2009.
57 Paris Court of Appeal, Case No RG 2008/23812 Pierre Fabre Dermo-Cosmétique.
58 Case C-390/09 Pierre Fabre Dermo-Cosmétique. The referred question is whether a general and absolute prohibition to sell contract goods to end users via the Internet, imposed on authorized distributors within the framework of a selective distribution network, constitutes an infringement of Art 101(1) TFEU, which is not exempted under Regulation 2790/1999, however could possibly benefit from an individual exemption under Art 101(3) TFEU.
§ 300  Robert Molden

It is therefore interesting to note that the Commission, in the first half of 2010, has announced that it intends to submit amicus curiae observations in two new cases, before the Irish High Court and before the Supreme Court of the Slovak Republic.

However, in view of the limited practical experience gained so far as to national courts' implementation of amicus curiae observations by the Commission, it is still difficult to make any empirically based proposal as to whether it would be necessary to amend Article 15 Regulation 1/2003 in order to obtain a higher degree of legal certainty by specifying what formal role and standing the Commission should have in national proceedings.

B. Amicus Curiae Observations Issued by the SCA to Swedish Courts in Competition Law Cases

i. The Soda-Club Case

On 25 March 2010, the SCA sent written amicus curiae observations to the Svea Court of Appeal in Stockholm in the Soda-Club case. This is the first time that the SCA made use of its right under Article 15(3) Regulation 1/2003 to submit amicus curiae observations in competition law cases handled by Swedish courts.

The background is as follows. Soda-Club and Vikingsoda are competing companies active, inter alia, in the business of refilling cartridges used for the production of soda water with carbon dioxide. Vikingsoda does not only refill its own cartridges but also cartridges of Soda-Club. In doing so, Vikingsoda adds its trademark Vikingsoda to the Soda-Club cartridges which bear the trademark SODA-CLUB. On 5 February 2010, the Stockholm District Court took an interim injunction decision prohibiting Vikingsoda, inter alia, from adding its trademark on cartridges bearing the SODA-CLUB trademark, as this would constitute an infringement of Soda-Club’s rights to its trademark.

Vikingsoda appealed the interim injunction decision to the Svea Court of Appeal which granted leave to appeal. In its amicus curiae observations to the Svea Court of Appeal, the SCA points out that its preliminary investigations indicate that Soda-Club’s exercise of its intellectual property rights may constitute an abuse of a dominant position. The Soda-Club case is still pending.

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40 See European Commission, 'Observations as Amicus Curiae — New Developments' ECN Brief 2/2010. The case concerns a certain rationalisation scheme in the Irish beef industry organised by the Beef Industry Development Society (BIDS). Upon a preliminary ruling by the Court of Justice of 20 November 2008 in Case C-209/07, the Irish Supreme Court found in a judgment of 5 November 2009 that the scheme infringed Art 101(1) TFEU and remitted the case back to the High Court to decide on whether the conditions of Art 101(3) are satisfied; it is in this remitted case that the Commission has decided to submit amicus curiae observations.

41 See press release of the Antimonopoly office of the Slovak Republic of 4 May 2010, available at www.antimon.gov.sk/135/3892/the-european-commission-intends-to-express-its-standpoint-in-the-matter-of-abuse-of-dominant-position.pdf as well as the press release of 7 December 2007, available at www.antimon.gov.sk/427/2668/the-antimonopoly-office-of-st-will-submit-an-appeal-against-judgement-of-the-county-court-in-bratislava.pdf. The case concerns the appropriate level of fines to be imposed on a rail-cargo firm found of having abused a dominant position. In a judgment of 6 December 2007, the County Court in Bratislava, while upholding the Antimonopoly office’s finding of abuse of a dominant position, had reduced the amount of the fines imposed by 86%. The Antimonopoly Office considered that the imposition of such a low sanction — 9 million SKK — instead of 75 million SKK, for a serious breach of competition rules meant that the sanction would not have sufficient preventive effects. It therefore appealed to the Supreme Court of the Slovak Republic, which on 4 May 2010 decided to suspend the case until the Commission submits its amicus curiae observations.

42 The case number at the Svea Court of Appeal is Ö 1561-10, the case number at the Swedish Competition Authority is 652/2009.
IV. The Right of National Courts to Request Opinions from the Commission in Competition Law Cases

A. General Points on Requests of Opinions from the Commission by National Courts in Competition Law Cases

The right of national courts to request opinions from the Commission is embodied in Article 15(1) Regulation 1/2003, which reads as follows:

In proceedings for the application of Article 101 or Article 102 TFEU, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules (emphasis added).

Article 15(1) Regulation 1/2003 is supplemented by the Cooperation Notice, which provides the following information:

In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information. In order to ensure the efficiency of the cooperation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.

When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.44

Between May 2004 and 31 March 2009, the Commission issued opinions on 18 occasions on requests from national courts on questions concerning the application of what are now Articles 101 and 102 TFEU.45 Nine of these eighteen opinions were issued to courts in Spain, five to courts in Belgium, two to courts in Sweden and one each to courts in Lithuania and the Netherlands.46

The Commission opinions are summarised in the Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy of July 2009 as follows:

278. The opinions issued to Spanish courts all concerned litigation between service station operators and wholesale suppliers of petroleum products. In most cases, the service station operators were seeking a declaration of nullity of the contract they have concluded with the wholesaler on the grounds that it infringed EC competition law.

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43 The right of national courts to request information from the Commission is also embodied in Art 15(1) Regulation 1/2003. However, for practical reasons, the right to request information will be dealt with in a separate part, see V below.
44 Paras 26–29 Cooperation Notice.
45 Para 277 Staff Working Paper.
46 Some of the opinions are published on the Commission’s website www.ec.europa.eu/competition/court/antitrust_requests.html.
279. The other opinions issued by the Commission relate to a wide variety of matters. The Commission has given opinions to Belgian courts on: exclusive purchasing agreements for beer and non-beer beverages; the application of Articles [101] and [102 TFEU] to exhibitions; the application of Article [102 TFEU] to favourable conditions and rebates granted by collecting societies; the conformity of the general conditions in a pilotage contract, including an exoneration of responsibility and an indemnity clause, with Article [102 TFEU]; and the applicability of Articles [101] and [102 TFEU] to the exclusion of one of the members of a standards setting organization. 

281. In an opinion given to a Dutch national court, the Commission provided guidance on whether quota allocations for mussel seeds in the Netherlands which set by an association of mussel farmers for its members, fell to be assessed under Articles [101] and [102 TFEU] or whether it came within the scope of Regulation 26/62 on the application of competition rules to agricultural products. Finally, the Commission provided an opinion to a Lithuanian court on whether it was compatible with Article [106(1) TFEU], in conjunction with Article [102 TFEU], for a municipality to carry out a tender procedure for the award of an exclusive right to collect waste for 15 years.

282. Some stakeholders have highlighted what they perceive as reluctance on the part of some national judges to seek opinions from the Commission under Article 15(1). To try to address this issue, the Commission has published examples of opinions given to national courts on the Directorate General for Competition's website so that national courts can get an idea of what an opinion can provide. Guidance is also given on the Directorate General for Competition's website detailing what requests for opinions should contain.47

47 This is only done once the judgment in the court case concerned has been rendered and is subject to conformity with national procedural, at www.ec.europa.eu/competition/court/requests.html.

B. Requests for Opinions from the Commission by Swedish Courts in Competition Law Cases

So far, only two requests for an opinion have been made by Swedish courts in competition law cases, one by the Swedish Supreme Court and one by the Swedish Market Court. These requests and corresponding opinions will briefly be presented below.

i. The Ystad Harbour Case

On 18 October 2006, the Swedish Supreme Court made a request for an opinion under Article 15(1) Regulation 1/2003 for the very first time. In the private enforcement case at question, Bornholms Trafikken, which is owned by the Kingdom of Denmark and operates ferryboat traffic between Ystad and the Danish island of Bornholm, had claimed that the harbour of Ystad abused its dominant position by charging excessive prices to Bornholms Trafikken.

In its request for an opinion, the Swedish Supreme Court asked the Commission for its opinion on 'whether the provisions of port services in the port of Ystad to ferry operators offering ferry services for passengers and vehicles on the route Ystad-Rönne should be regarded as the relevant market for the application of Article 102 TFEU'.

In an opinion of eight pages, dated 16 February 2007, the Commission provided the Swedish Supreme Court with – in my view – a very useful overview over the method used by the Commission to define the relevant market.\(^\text{48}\) The issue of whether the harbour of Ystad had a dominant position was outside the scope of the opinion.

On 19 February 2008, the Swedish Supreme Court found in an interim judgment that the harbour of Ystad has a dominant position in the provision of harbour services. In its judgment, the Swedish Supreme Court explicitly refers to the opinion of the Commission, stating the following:

In its opinion, the Commission sets out the method and the process the Commission applies when defining the relevant market. The method, which is based on established EU case-law, should be applied in the present case (author’s translation).\(^\text{49}\)

Hence, the Ystad Harbour case is in my view a very good example of how the coordination measures embodied in Article 15(1) Regulation 1/2003 can work well in practice.

ii. The EKfors Case

On 18 January 2007 the European Commission for the first time received a request for opinion under Article 15(1) Regulation 1/2003 from the Swedish Market Court. In its opinion of approximately 10 pages, the Commission sets out under which conditions municipalities providing street lighting can be considered an ‘undertaking’ under Articles 101 and 102 TFEU.

The background to this private enforcement case is as follows. The municipalities of Övertorneå and Haparanda claimed that EKfors, a provider of electricity supply services, had abused its dominant position when it cut off electricity services in order to compel the municipalities to accept excessive price increases. As a result, street lighting ceased to function in substantial areas of the two municipalities. In order to have a subsidiary right of action under Swedish law to bring its case to the Swedish Market Court, the municipalities had to qualify as undertakings in the sense designated by Articles 101 and 102 TFEU.\(^\text{50}\)

In its judgment of 15 November 2007,\(^\text{51}\) the Swedish Market Court found that the municipalities of Övertorneå and Haparanda qualified as undertakings in the sense designated by Articles 101 and 102 TFEU.\(^\text{52}\) While the judgment mentions that the Swedish

\(^{48}\) For this reason it is unfortunate that the opinion of the Commission has not yet been published on the Commission’s website. In the letter accompanying its opinion, the Commission informed the Swedish Supreme Court that the Commission intended to publish the opinion. Therefore, the authentic Swedish language opinion was complemented by an English translation of the opinion. In its letter, the Commission also informed the Swedish Supreme Court that if it had any objections against such a publication, the Swedish Supreme Court should indicate this at the latest ‘when a copy of the judgment is forwarded to the Commission in accordance with Article 15(2) of Regulation 1/2003’. However, it appears that the judgment, more than two years after its delivery, still has not been forwarded to the Commission, which means that the Commission has not yet been able to publish either the judgment or the opinion on its website. It may therefore be expedient to note that the judgment of the Swedish Supreme Court can be downloaded from its website www.bogstaddomstolen.se. Both the Swedish as well as the English version of the Commission’s opinion can be obtained free of charge by sending an e-mail to the Registry of the Swedish Supreme Court, the address is hogsta.domstolen@dom.se.

\(^{49}\) Judgment of the Swedish Supreme Court of 19 February 2008 in Ystad Harbour (n 12) 10. The case is still pending as to whether the harbour of Ystad abused its dominant position.

\(^{50}\) The municipalities brought their case to the Swedish Market Court after the Swedish Competition Authority had decided not to intervene against EKfors.


\(^{52}\) As to the merits of the case, the Swedish Market Court found that no abuse of a dominant position could have occurred as the decision of EKfors to cut off electricity supply did not entail that ‘the conditions for competition had been impaired’; see judgment p 15 last paragraph.
Market Court requested an opinion from the Commission under Article 15(1) Regulation 1/2003 as to interpretation of the notion of undertaking under EU competition law, the judgment does not explicitly mention to what extent the Swedish Market Court has followed the Commission's opinion. However, in my view, it can be said that the judgment of the Swedish Market Court is well in line with the Commission's opinion in this respect.

C. The Right of Swedish Courts to Request Opinions from the Swedish Competition Authority in Competition Law Cases

Article 15(1) Regulation 1/2003 entitles national courts to request opinions from the Commission. However, national courts do not derive any right to request opinions from their national competition authorities from Regulation 1/2003; such a right can only be derived from national procedural law.

Swedish courts regularly ex officio request opinions from the SCA in the area of public procurement law. Between September 2007, when the SCA became the competent authority in this area, and May 2010, Swedish courts requested opinions on the interpretation of Swedish and EU public procurement law in no less than 12 cases. The legal basis for this is the provision in Article 24 Swedish Act on Administrative Procedure, according to which an administrative court may request an opinion from a government authority holding expert knowledge in a given area of law.

The right of Swedish civil courts to request expert opinions from government authorities – such as the SCA – is embodied in Chapter 40, Article 1 Swedish Code of Judicial Procedure. In public enforcement cases, civil courts may make such a request for an opinion ex officio. However, in civil litigation cases, civil courts may no longer make such a request ex officio but only on request by one of the parties.

Before Regulation 1/2003 entered into force in May 2004, Swedish courts made several requests for opinions from the SCA in cases concerning the private enforcement of competition law. The last time a Swedish court requested an opinion from the SCA was in June 2002, in what is probably the biggest private enforcement case ever in Sweden, the SAS v Lufthavnaffærenen case.
i. The SAS v Luftfartsverket Case

On 27 April 2001, the Göta Court of Appeal ruled that Luftfartsverket, the Swedish authority in charge of civil aviation, had abused its dominant position by discriminating against SAS which had to pay higher fees than its competitors for using a specific terminal at the Stockholm Arlanda airport. The case did not involve any damages. However, the Göta Court of Appeal found that the abuse by Luftfartsverket entailed nullity, which meant that as a result of the judgment SAS was reimbursed for payments of fees and was liberated from future fees to an overall amount of more than €100 million.

The judgment was appealed to the Swedish Supreme Court, which on 10 June 2002 decided to request an opinion from the SCA before taking a decision on whether to grant leave of appeal. After the SCA submitted its opinion on 3 October 2002, the Swedish Supreme Court decided on 12 November 2002 not to grant leave of appeal.

It is striking that no Swedish court has made any request for an opinion on the interpretation of competition law from the SCA since June 2002. One reason may be that there seems to be a widespread general understanding that Swedish courts, after Regulation 1/2003 came into force, may no longer ask the SCA for any opinions on questions concerning the application of EU competition law. The reason for this – in my view erroneous – conclusion may lie in an e contrario interpretation of Article 15(1) Regulation 1/2003, according to which 'courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules' (emphasis added).

However, according to Article 15(4) Regulation 1/2003, 'This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State'.

An e contrario interpretation of Article 15(1) Regulation 1/2003 would lead to the conclusion that Regulation 1/2003 as of May 2004 precludes national courts from requesting opinions on the interpretation of EU competition law. In my view, such an e contrario interpretation is not appropriate. Instead, Regulation 1/2003 should correctly be understood not to constitute any legal obstacle for Swedish courts' right under Swedish law to request an opinion from the SCA on the interpretation of Swedish or EU competition law.

The most straightforward way to remove this uncertainty would be to amend Article 15(1) Regulation 1/2003, giving national courts the explicit power based on EU law to request opinions from NCAs on the interpretation of EU competition law. As NCAs already have the power under Article 15(3) to submit amicus curiae observations to national courts it may make sense to give national courts the corresponding right to request opinions from NCAs.

In this respect it is interesting to note that the two Swedish requests for an opinion from the Commission under Article 15(1) Regulation 1/2003 have been made by the Swedish...
Supreme Court and by the Swedish Market Court. None of the 48 Swedish district courts where private enforcement cases can be brought has so far made any request for an opinion from the Commission. Private enforcement of EU competition law before these courts may, for example, consist in one party to a contract claiming nullity under Article 101(2) TFEU. For a district court judge lacking any prior experience in applying EU competition law it could constitute less of a psychological barrier to request guidance from the SCA as compared to the European Commission in Brussels. This is one of the reasons why I think that empowering national courts to request opinions from their NCA may be a useful tool in improving the effectiveness and feasibility of private enforcement of competition law. This issue will be explored more in detail in part VII, which is titled: 'Why national courts are not entitled by Regulation 1/2003 to request information and opinions from NCAs – Proposal to consider amending Regulation 1/2003 in this respect.' This section includes an overview over the legislative history of the coordination measures now embodied in Article 15 Regulation 1/2003.

V. The Right of National Courts to Request Information from the Commission in Competition Law Cases

The right of national courts to request information from the Commission is embodied in Article 15(1) Regulation 1/2003, which reads as follows:

In proceedings for the application of Article [101] or Article [102 TFEU], courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules (emphasis added).

As follows from the provisions in the Commission Notice on the cooperation between the Commission and national courts, the information to be provided by the Commission to national courts under Article 15(1) Regulation 1/2003 can be divided into two sub-groups of information.

The first sub-group concerns 'information of a procedural nature to enable it to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position.' The communication of such information of a procedural nature to national courts should, in the words of Valentine Korah, 'not give rise to much trouble' and will therefore not be further analysed in this chapter.

The second sub-group of information consists of documents which the Commission has in its possession. As indicated in the cited provisions of the Notice above the communication of such documents from the Commission to the national courts raises serious prob-

64 By the Swedish Supreme Court in the Ystad Harbour case, by the Swedish Market Court in the EKfors case, see IV.B above.

65 The right of national courts to request opinions from the Commission is also embodied in Art 15(1) Regulation 1/2003. However, for practical reasons, the right to request opinions is dealt with in a separate section, see IVA above.

66 Para 21–26 Cooperation Notice. According to the Notice, the Commission will endeavour to provide the national court with the requested information within one month from the date it receives the request.

lems as to the protection of professional secrecy. According to the Notice, the Commission may only transmit documents covered by professional secrecy to a national court if it can and will guarantee protection of confidential information and business secrets. To my knowledge, no Swedish court has so far made any request under Article 15(1) Regulation 1/2003 to get access to documents held by the Commission. Requests under Article 15(1) of the said Regulation have been confined to opinions from the Commission, see IV.B above.

Access to the Commission's – and NCAs' – file and evidence is obviously of significant practical importance for private enforcement of EU competition law, in particular for follow-on actions. Access to the Commission's and NCAs' files entail significant legal issues related to diverging national rules on the protection of professional secrecy and is covered in the contribution to this volume by Professor Laurence Idot on this subject.

VI. The Obligation of Member States to Forward National Judgments on EU Competition Law to the European Commission

A. General Points

The obligation of Member States to forward national judgments on EU competition law to the Commission is embodied in Article 15(2) Regulation 1/2003, which reads as follows:

Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article [101] or Article [102 TFEU]. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

Article 15(2) is supplemented by the Cooperation Notice, whose relevant provision reads as follows:

According to Article 15(2) of the regulation, Member States shall send to the Commission a copy of any written judgment of national courts applying Articles [101] or [102 TFEU] without delay after the full written judgment is notified to the parties. The transmission of national judgments on the application of Articles [101] or [102 TFEU] and the resulting information on proceedings before national courts primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgment.  

The Staff Working Paper Accompanying the Report from the Commission on Competition Policy of July 2009 contains the following comments on Article 15(2) Regulation 1/2003:

Article 15(2) of Regulation 1/2003 requires Member States to forward to the Commission a copy of any written judgment of national courts deciding on the application of Articles [101] or [102 TFEU]. These judgments must be sent without delay after the full written judgment is notified to the parties. The Commission publishes a database of the judgments it receives from the Member States pursuant to Article 15(2). This database, although welcomed as potentially being a valuable source of case practice, is criticised by several stakeholders on the grounds that it is far from complete. Some stakeholders have provided suggestions for improving the functioning of

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104 Para 37 Cooperation Notice.
Article 15(2). For example, it has been proposed that the national competition authorities should be given the duty of assembling the relevant judgments in their respective territories and transmitting them to the Commission, as is currently done in several Member States. It is further proposed that this could be combined with a procedural duty on litigants to serve their initial pleadings on the Commission and/or national competition authority concerned, so that the latter could be alerted to the litigation at an early stage. Overall, options for ensuring a more efficient and effective way of providing access to national court judgments should be contemplated.99

The incompleteness of reported national judgments in EU competition law cases as highlighted in the Commission Staff Working Paper of April 2009 still persists more than one year later. For example, until 22 May 2010 the number of national court judgments published on the Commission’s website100 was the following for a sample of EU Member States: France: 40 judgments; Germany: 35 judgments; United Kingdom: 3 judgments; Italy: 1 judgment; Denmark: 1 judgment; Poland: 0 judgments. As for Sweden, there are 3 reported national judgments, 2 from the Swedish Market Court101 and 1 from the Swedish Supreme Court.102

B. The Swedish Example: Non-Transparent Provisions

In the first introductory chapter of the Swedish Competition Act, Article 3 contains the following general reference to the provisions of Regulation 1/2003:


Moreover, in Chapter 8 Swedish Competition Act which deals with Court procedures, Article 13 contains the following specific reference to Article 15 Regulation 1/2003:

A statement which has been submitted by the Commission of the European Community or the Swedish Competition Authority, thereby applying Article 15 of Council Regulation (EC) No 1/2003, may be taken into account by the court without the plea of a party. The parties shall be provided the opportunity to comment on the statement.

In my view, there is a lack of transparency and user-friendliness in the Swedish Competition Act as to the provisions of Regulation 1/2003. Even though it is true that Regulation 1/2003 is directly applicable and – from a formal point of view – no implementation into Swedish law is necessary, I think that it would make sense to replicate the provisions of Article 15 Regulation 1/2003 into the Swedish Act in a more explicit way. In particular, it is unfortunate that the Swedish Competition Act does not contain any explicit reference to the duty contained in Article 15(2) to forward copies of judgments on EU competition law to the Commission. The general reference to Regulation 1/2003 in Chapter 1, Article 3 SCA is too general. Therefore, the provision of Article 15(2) on the duty of the Member State Sweden to forward copies of Swedish courts judgments needs to be specified into Swedish law in order to work better in practice.

102 Judgment of the Swedish Supreme Court in Case T 2280-02 BMA v FV of 23 December 2004.
If the Swedish legislator does not specify in the Swedish Competition Act which authority or court is responsible for forwarding the Swedish judgments, there is a significant risk that no one assumes this responsibility. Moreover, there is a transparency problem, as a national judge is more familiar with applying provisions embodied in national laws as opposed to provisions only embodied in EU regulations without being explicitly replicated in national laws, such as the Swedish Competition Act or the Swedish Code of Judicial Procedure.75

The example of the German Competition Act below illustrates my points and can serve as a model for amendments to the Swedish Competition Act as well as competition acts in other Member States which lack the corresponding level of transparency and user-friendliness.

C. The German Example: Transparent Provisions

In Germany, cooperation between German courts and the Commission is governed by Article 90a German Act against Restraints of Competition (ARC),74 which reads as follows:

Cooperation of the Courts with the Commission of the European Community and the Cartel Authorities

(1) In all judicial proceedings where Article [101] or [102 TFEU] are applied the court shall, without undue delay after serving the decision on the parties, forward a duplicate of any decision to the Commission of the European Community via the Bundeskartellamt. The Bundeskartellamt may transmit to the Commission of the European Community the documents which it has obtained pursuant to § 90(1) sentence 2.

(2) In proceedings pursuant to paragraph 1 the Commission of the European Community may, acting on its own initiative, transmit written observations to the court. In case of a request pursuant to Art. 15(3) sentence 5 of Council Regulation (EC) No 1/2003 the court shall provide the Commission of the European Community with all documents necessary for the assessment of the case, including copies of all briefs and duplicates of all records, orders and decisions. § 4b (5) and (6) of the Federal Data Protection Act [Bundesdatenschutzgesetz] shall apply mutatis mutandis. The court shall provide the Bundeskartellamt and the parties with a copy of the written observations of the Commission of the European Community made pursuant to Art. 15(3) sentence 3 of Council

75 It should be pointed out that there is indeed a provision in Art 6 Swedish Competition Regulation of 2008 (Konsumentförsvarings 2008:504) which reads as follows: "When a civil court or the Swedish Market Court gives a judgment or takes a final decision concerning the application of Articles 101 or 102 TFEU, a copy of the judgment or decision should be sent to the Swedish Competition Authority on the same day" (author’s translation). The Swedish Competition Regulation of 2008 only contains seven paragraphs and does – with the exception of said Art 6 – not contain any provisions of significant practical importance for the application of EU competition law by Swedish courts. Its provisions are therefore likely to be overlooked by Swedish courts when applying EU competition law. Moreover, while the Competition Regulation of 2008 obliges Swedish courts to send copies of judgments applying Arts 101 and 102 TFEU to the Swedish Competition Authority, there is no explicit obligation on the Swedish Competition Authority to actually forward these judgments to the European Commission. The Swedish National Courts Administration publishes on its website (www.jhantbyd.kastolr.se) a number of practical handbooks widely used at Swedish courts. In the Handbook on Delivery of Judgments and Decisions in Civil Courts of Appeal – Domstolserkets handbook expediering hovrätt – there is a clear and explicit statement under Section B 81.4 that if a civil court of appeal delivers a judgment or decision applying Arts 101 or 102 TFEU, the court shall send a copy to the Swedish Competition Authority. However, in the corresponding Handbook on Delivery of Judgments and Decisions in civil courts of first instance – Domstolserkets handbook expediering tingsrätt material – there is no such statement of the court’s duty to send a copy to the Swedish Competition Authority when applying Arts 101 or 102 TFEU. The handbook only states, under Section 60.1, that if a court delivers a judgment concerning damages under the Swedish Competition Act, a copy of the judgment should be sent to the Swedish Competition Authority.

74 Gesetz gegen Wettbewerbsbeschränkungen (GWB), downloaded from the Bundeskartellamt’s homepage, www.bundeskartellamt.de.

(3) In proceedings pursuant to paragraph 1 the court may ask the Commission of the European Community to transmit information in its possession or for its observations on questions concerning the application of Article [101] or Article [102 TFEU]. The court shall inform the parties about a request made pursuant to sentence 1, and shall provide them as well as the Bundeskartellamt with a copy of the reply of the Commission of the European Community.

(4) In the cases of paragraphs 2 and 3 the contacts between the court and the Commission of the European Community may also occur via the Bundeskartellamt.

Article 90a ARC thus replicates the provisions of Article 15 as to the possibility of the Commission to submit amicus curiae observations (paragraph 2) as well as German courts' right to request information and opinions from the Commission (paragraph 3). In particular, the German provisions are explicit on how this Member State's duty to forward copies of judgments from German courts to the Commission shall be handled in practice. According to Article 90a(1) ARC the German court in question is obliged to forward a copy of its judgment to the Bundeskartellamt, which then forwards it to the Commission.

In my view, the provisions of Article 90a ARC may serve as an example of high transparency and user-friendliness concerning the rights and duties of national courts stemming from Article 15 Regulation 1/2003. In particular, I propose that similar provisions should be inserted in the Swedish Competition Act to increase transparency and make clear which authority is responsible for ensuring that copies of judgments by Swedish courts on EU competition law are forwarded to the Commission. Moreover, I propose that corresponding amendments should be made in competition law acts of other Member States which lack the transparency and user-friendliness of the German ARC.

VII. Why National Courts Are Not Entitled by Regulation 1/2003 to Request Information and Opinions from NCAs – Proposal to Consider Amending Regulation 1/2003 in this Respect

A. A Puzzling Asymmetry between Articles 15(1) and 15(3)

As mentioned in the introduction to this chapter one of the main ideas behind the modernisation of EU competition law procedure was to achieve decentralised application of EU competition law by national courts and national competition authorities.

The provisions of Article 15(3) Regulation 1/2003 entitling both NCAs as well as the Commission to submit amicus curiae observations on issues relating to EU competition law fit nicely into the decentralisation agenda. Moreover, it can be assumed from the wording of the provision that amicus curiae observations in the majority of cases will be submitted by NCAs as opposed to the Commission.79

79 Art 15(3) Regulation 1/2003 first mentions the NCAs and only then the Commission. Moreover, the Commission is only entitled to submit amicus curiae observations on the condition that the coherent application
Against this background, it is somewhat puzzling that the corresponding right of NCAs to request information or opinions only apply in relation to the Commission as the centralised European competition authority. In a truly decentralised system it would be natural to expect that national courts also would be entitled to request information or opinions from their NCA.

In order to analyse the reasons for this asymmetry, it is necessary to present an overview of the history of the legislative process leading to the enactment of Regulation 1/2003, which is done in the following subsection.

B. An Overview of the Legislative History of the Coordination Measures Embodied in Article 15 Regulation 1/2003

The legislative process leading to the enactment of Regulation 1/2003 in December 2002 was launched by the Commission's White Paper\(^6\) in April 1999. Upon a consultation process, the Commission published a Proposal for a new Regulation 1/2003 in September 2000.\(^7\)

All three coordination measures later to be embodied in Article 15 Regulation 1/2003 and being the subject of this chapter were already presented in the White Paper.\(^8\) As will be set out below, two of the coordination measures were substantially altered during the legislative process (the duty to forward copies of judgments and the right to submit amicus curiae observations). In contrast, the third coordination measure (the right of national courts to request information or opinions) remained unchanged through the entire legislative process.

i. The Obligation to Forward Copies of National Judgments on EU Competition Law to the Commission – Article 15(2)

According to the White Paper it is first of all vital that the Commission should be aware of proceedings in which Articles 101 and 102 TFEU are invoked before the courts, so that the Commission is made aware of any problems of textual interpretation or lacunae in the legislative framework. The White Paper therefore proposed that the new regulation should require courts to supply such information, i.e. not only copies of judgments rendered but information on all new court proceedings once Article 101 or 102 TFEU are invoked.

The Commission's proposal for a new Regulation 1/2003 of September 2000 considerably narrowed down the duties of national courts in this respect. Instead of informing the Commission of all new court proceedings where Articles 101 or 102 TFEU are invoked, national courts were only to forward judgments applying these Articles to the Commission, within one month. The final version of Regulation 1/2003 further narrowed down the duties of national courts, as only written judgments were to be forwarded to the Commission. On the other hand, the time frame was tightened, from one month following of EU competition law so requires, whereas there is no such limitation on the NCAs' right to submit amicus curiae observations.


\(^8\) White Paper (n 76) para 107.
the delivery of the judgment to 'without delay after the full written judgment is notified to the parties'.

ii. The Right of NCAs and the Commission to Submit Amicus Curiae Observations to National Courts – Article 15(3)

The original White Paper proposed that the Commission should be allowed, subject to the leave of the court, to intervene in judicial proceedings that come to its attention as a result of national courts informing the Commission of new court proceedings where Articles 101 or 102 TFEU are invoked.

The Commission's proposal for a new Regulation 1/2003 in September 2000 also contained several amendments compared to the original proposals of the White Paper. Firstly, the Commission's right to submit written or oral amicus curiae observations would no longer be subject to any leave of the court. Secondly, a possibility for NCAs to submit amicus curiae observations was introduced, either as a representative of the Commission or on their own initiative. Thirdly, the Commission's right of submitting amicus curiae observations was made dependent on 'reasons of the Community public interest'.

Again, the final version of Regulation 1/2003 enacted in December 2002 contained a number of significant changes as compared to the Commission's Proposal of September 2000. Firstly, the right of NCAs to submit amicus curiae observations was highlighted by a change of order, mentioning the NCAs' right first and only then the Commission's right to submit amicus curiae observations. Simultaneously, the possibility for the Commission to have itself represented by NCAs was suppressed. Secondly, the right of NCAs and the Commission to submit oral amicus curiae observations was made dependent on the permission of the national court, as opposed to written amicus curiae observations where such permission is not required. Thirdly, the condition for the Commission to be entitled to submit amicus curiae observations was changed from 'reasons of the Community public interest' to 'where the coherent application of Article 101 or 102 TFEU so requires'.

iii. The Right of National Courts to Request Information and Opinions from the Commission – Article 15(1)

The original White Paper proposed that the new Regulation 1/2003 should incorporate the rules then set out in the 1993 Notice,79 which provided that in the course of proceedings before them national courts may address themselves to the Commission to ask for information of a procedural, legal or economic nature.80

The Commission's Proposal for a new Regulation 1/2003 of September 2000 contained the very provision envisaged in the original White Paper, namely that 'in proceedings for the application of Article 101 or 102 TFEU, courts of the Member States may ask the Commission for information in its possession or for its opinion on questions concerning the application of the Community competition rules'.

In its Explanatory Memorandum accompanying the Proposal, the Commission explained that the proposed Regulation codifies the existing obligation of the Commission

80 The 1993 Notice in this respect followed the judgment of the ECJ in Case C-234/89 Delimitis v Henninger Brau AG [1991] ECR I-395 para 53, according to which national courts, based on the Commission's obligation of loyal cooperation, are entitled to obtain factual or legal information from the Commission.
to cooperate with national courts. The Explanatory Memorandum does not present any reasons for not entitling national courts also to request information or opinions from NCAs.

The final version of Article 15(1) Regulation 1/2003 is in principle identical to the text of the Commission's Proposal, i.e. Regulation 1/2003 only entitles national courts to request information or opinions from the Commission and not from NCAs. Recital 21 explains why Regulation 1/2003 should entitle national courts to be able to ask the Commission for information or for its opinion on points concerning the application of EU competition law. However, it is silent on the question why the right of national courts to obtain information or opinions should not be applicable in relation to NCAs.

C. Analysis of the Legislative Process

It follows from the overview of the legislative process that, at the outset, i.e. in the original White Paper of April 1999, there was symmetry between the Commission's right to submit amicus curiae observations and the national courts' right to request, inter alia, opinions from the Commission. NCAs were entirely kept outside the coordination mechanism.

This symmetry was already lost during the first year and a half of the legislative process, as the Commission's Proposal of September 2000 introduced a possibility also for NCAs to submit amicus curiae observations to national courts, without any corresponding right conferred on national courts to request opinions from NCAs. However, at this stage, the wording of the Proposal suggests that amicus curiae observations would mostly be submitted by the Commission, while amicus curiae observations submitted by NCAs on their own initiative would be less frequent.

It was only at the final stage of the legislative procedure, in Regulation 1/2003, that the order was reversed and that amicus curiae filings by NCAs were first mentioned. At that stage, the provisions became clearly asymmetric. The novel and far-reaching right of NCAs to submit amicus curiae observations is not matched by any corresponding right of national courts to request opinions from their NCA. As set out in the beginning of this section, this is somewhat puzzling as such a right would fit in well in the overall agenda of increased decentralisation.

As set out above, two of the coordination measures were substantially altered during the legislative process (the duty to forward copies of judgments and the right to submit amicus curiae observations). Both of these coordination measures were new and led to considerable public debate as well as intervention by Member States in the legislative process.

However, in contrast, the third coordination measure (the right of national courts to request information or opinions from the Commission) remained unchanged throughout the entire legislative process. One possible explanation for this is that this measure was considered to be rather uncontroversial as it only entailed codifying existing case-law. The publicly available documents relating to the legislative process mentioned above do not contain any reasoning as to why national courts' right to request information and opinions should not also apply in relation to NCAs.

In an article on the White Paper on Modernisation published in 2000, Katherine Holmes argued that the Commission should consider to encourage national courts to seek

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the views of NCAs in court proceedings. However, it appears that the pros and cons of giving national courts a right under Article 15(1) to request information and opinions also from NCAs were not really debated during the legislative process behind Regulation 1/2003.

In my view, there are good reasons for the Commission to now consider amending Article 15(1) Regulation 1/2003 in this respect, giving national courts the right to request information and opinions also from NCAs. Such an amendment may lead to a more efficient coordination scheme. In particular, I think that this right may be particularly useful in private enforcement cases before courts lacking such expert knowledge of EU competition law, which is held by judges active at the specialised courts of public enforcement. The subsequent intrusion into the procedural autonomy of the Member States may well be a price worth paying. Moreover, the degree of additional intrusion into the procedural autonomy of Member States is rather limited as compared to the quite far-reaching intrusion into the procedural autonomy of Member States already caused by the introduction of the right of the NCAs and the Commission to submit amicus curiae observations on their own initiative to national courts.
Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective

ROBERT MOLDÈN

The modernisation of the application of EU competition law in May 2004 entailed a far-reaching decentralisation, empowering national courts and NCAs to apply EU competition law fully.

The only way for a national court to obtain binding guidance on the interpretation of EU competition law is to make a reference for a preliminary ruling to the Court of Justice. However, this procedure entails a delay of 15–16 months which is the average time for the Court of Justice to process a reference. During the first 14 years of Sweden’s EU membership, from 1995 to 2009, Swedish courts made references for a preliminary ruling in 67 cases; only two of these references concern the interpretation of EU competition law.

In order to prevent the decentralisation of the application of EU competition law from leading to a significant loss of coherence in the uniform application of substantive EU competition law, Regulation 1/2003 introduced a number of new coordination measures, which are the subject of my contribution.

Between May 2004 and April 2009, the Commission received 18 requests for an opinion on the application of EU competition law, of which two requests from Swedish courts. In the same period, the Commission submitted written amicus curiae observations on the application of EU competition law to national courts on two occasions. Since then, the Commission has decided to submit amicus curiae observations on three more occasions. The Swedish Competition Authority submitted its first ever amicus curiae observations in the Soda Club case on 25 March 2010.

I share the view expressed in the Commission’s Report on the functioning of Regulation 1/2003 from April 2009 that there are probably good reasons for the Commission to have greater recourse to the instrument of amicus curiae observations.

Before the entry into force of Regulation 1/2003, Swedish courts regularly requested opinions on the interpretation of Swedish and EU competition law from the Swedish Competition Authority. While Swedish courts still regularly request opinions from the Swedish Competition Authority on the interpretation of Swedish and EU public procurement law, no Swedish court has requested any opinion on the interpretation of EU competition law since the entry into force of Regulation 1/2003.
One possible explanation for the absence of any requests of opinions from the Swedish Competition Authority may be an _e contrario_ interpretation of Article 15(1) Regulation 1/2003, which would lead to the conclusion that Regulation 1/2003 as of May 2004 precludes national courts from requesting opinions on the interpretation of EU competition law from a NCA as no such right is foreseen by Article 15(1) Regulation 1/2003. In my view, such an _e contrario_ interpretation of Regulation 1/2003 is not appropriate. Instead, Regulation 1/2003 should correctly be understood not to constitute any legal obstacle for Swedish courts' right under Swedish procedural law to request an opinion from the Swedish Competition Authority on the interpretation of Swedish or EU competition law.

It appears that the pros and cons of giving national courts a right under Article 15(1) to request information and opinions also from NCAs – as opposed to only from the Commission – were not really debated during the legislative process behind Regulation 1/2003.

In my view, there are good reasons for the Commission now to consider amending Article 15(1) Regulation 1/2003 in this respect, giving national courts the right to request information and opinions also from NCAs. Such an amendment may lead to a more efficient coordination scheme. I think that this right may be particularly useful in private enforcement cases before courts lacking such expert knowledge of EU competition law which is held by judges active at the specialised courts of public enforcement. The subsequent intrusion into the procedural autonomy of the Member States may well be a price worth paying. Moreover, the degree of additional intrusion into the procedural autonomy of Member States is rather limited as compared to the quite far-reaching intrusion into the procedural autonomy of Member States already caused by the introduction of the right of the NCAs and the Commission to submit amicus curiae observations on their own initiative to national courts.

In order to enable the Commission to monitor national court proceedings where EU competition law is applied, its Member States are obliged to forward to the Commission a copy of any written judgment of national courts applying EU competition law. However, it appears that a significant number of such judgments are not reported to the Commission.

One possible explanation for the poor performance of Member States in reporting judgments in which EU competition law is applied to the Commission may be a lack of transparency in national competition law acts on which court or authority shall be responsible for the forwarding of judgments to the Commission. In this respect, it is interesting to look at the provisions of Article 90a(1) German Act against Restraints of Competition. The provisions in question state explicitly that it is the duty of the German court giving the judgment to forward a copy to the Bundeskartellamt, which then forwards it to the Commission.

In my view, the provisions of Article 90a German Act against Restraints of Competition may serve as an example of high transparency and user-friendliness concerning the rights and duties of national courts stemming from Article 15 Regulation 1/2003. In particular, I propose that similar provisions should be inserted in the Swedish Competition Act to increase transparency and make clear which authority is responsible for ensuring that copies of judgments by Swedish courts on EU competition law are forwarded to the Commission. Moreover, I propose that corresponding amendments should be made in competition law acts of other Member States which lack the transparency and user-friendliness of the German Act against Restraints of Competition.
APPENDIX C: THIRD LICENTIATE ARTICLE
‘Public Procurement and Competition Law
From a Swedish Perspective
– Some Proposals for Better Interaction’

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PUBLIC PROCUREMENT AND COMPETITION LAW FROM A SWEDISH PERSPECTIVE – SOME PROPOSALS FOR BETTER INTERACTION

Robert Moldén*

1. INTRODUCTION

1.1 Purpose and Structure of this Article

This article deals with Public Procurement and Competition Law from a Swe-

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In his book, Albert Sánchez Graells gives the following introduction, which is also very well suited to serve as introduction to the present article:

"[The] significant overlap between competition and public procurement law (i.e. the competition distortions that public procurement regulations and administrative practices can produce themselves) still remains unexplored. Generally, publicly-created distortions of competition in the field of public procurement have not yet been effectively tackled by either competition or public procurement law — probably because of the major political and governance implications embedded in our surrounding public procurement activities, which make development and enforcement of competition law and policy in this area an even more complicated issue, and sometimes muddy the analysis and normative recommendations. Notwithstanding these relevant difficulties, in our view, this is a very relevant area of competition policy to which development could bring substantial improvements and, consequently, it merits more attention than it has traditionally received."1

The present article will analyse the interaction between public procurement and competition law from a Swedish perspective and from a number of different angles.

Section 2 of this article sets out various aspects on how competition law is applied on actions by tenderers in public procurement proceedings. Firstly, we will look at Swedish case law concerning bid-rigging. A proposal will be presented to amend the Swedish Public Procurement Act in order to highlight the unlawfulness of bid-rigging/joint tenders under Swedish competition law. Then we will look at public procurement and anti-competitive information exchange in general, followed by an analysis of Swedish case law concerning the protection of business secrets in public procurement proceedings.

Section 3 focuses on competition aspects related to framework agreements as stipulated by Article 32 (2) of Directive 2004/18/EC. In particular, the case of too long respectively too large framework agreements will be analysed. As to the latter situation — too large framework agreements — a proposal to amend the Swedish Public Procurement Act will be presented in view to bring its provisions in line with the Directive in this respect.

Section 4 provides an overview over how competition aspects have been dealt with in Swedish case law related to the principle of proportionality, respectively

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the principle of equality. Then the purpose of public procurement law will be discussed, arguing for the need to apply a general competition principle in public procurement law as proposed by Albert Sánchez Graells in his above-mentioned book.

Section 5 will address the issue on competition law applicable to actions by contracting authorities. The EU case law in the FENIN and SELEX judgments will be analysed and criticised as it, in view of the author, limits the application of competition law to public procurement law for no good reason. A reversal of this case law will therefore be proposed in line with the suggestions made by Albert Sánchez Graells in his above-mentioned book. Finally, competition law applicable to long-term agreements, respectively joint purchasing will be presented making analogies to the public procurement rules on too long, respectively too large framework agreements.

This article does not have the ambition to cover all aspects of the interaction between public procurement and competition law. Instead, a limited number of aspects have been chosen. However, even so, this article covers a large number of different issues. In view of the limited space available for this article, it would not be practically possible to make a comprehensive and in-depth analysis of all relevant Swedish judgments. Instead, a selection of particularly interesting judgments has been made in order to serve as a background for the various proposals to amend the Swedish Public Procurement Act made in this article. In other words, this is an article heavily focused on the de lege ferenda perspective instead of the more common de lege lata perspective, or put in plain English: This is an article more concerned about what the law should be rather than where the law currently stands.

The timing for suggesting amendments to the Swedish Public Procurement Act has been carefully chosen. Firstly, a new EU Directive on Public Procurement is to be adopted soon. Secondly, following the adoption of the new EU Directive on Public Procurement, the Swedish Public Procurement Committee (in Swedish language: "Upphandlingsutredningen") is to evaluate national Swedish procurement legislation and to propose amendments to the Swedish Public Procurement Act, with a view to obtain more value for money in Swedish public procurement. As pro-competitive public procurement is the key to

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2 The Committee has published a first preliminary report titled "På jakt efter den gods affären - analys och erfarenheter av den offentliga upphandlingen" in November 2011. The Committee's webpage is http://upphandlingsutredningen.se/.

3 According to its webpage, the Committee has the following mission: "The Public Procurement Committee is to evaluate the procurement rules from an economic and social policy perspective. The aim is to investigate if the procurement rules adequately allow for the con-
obtain more value for money in public procurement, the present article on public procurement and competition law from a Swedish perspective should therefore be timely, in particular as to its proposals for legislative amendments aiming at better interaction between public procurement and competition law. However, the target group for this article does not only consist of Swedish public procurement lawyers, Swedish competition lawyers and the general Swedish public. The article is also designed to appeal to international readers who would like to get an overview over current Swedish case law in public procurement. This is one reason why this article has been written in English. For the benefits of international readers, section 1.2 of this article contains a brief introduction to Swedish Public Procurement and Competition Law, which can be skipped by Swedish readers.

This article is the last in a series of articles related to public procurement and anti-competitive information exchange, which, taken together, shall be presented as the author's licentiate thesis in competition and public procurement law at the University of Lund in early 2013. Certain aspects of the present article will be developed in-depth in my doctoral thesis due to be presented at the University in Lund in 2014. Any comments and suggestions will therefore be very much appreciated and taken into account when preparing the final doctoral thesis.

As to language, the present names of the two Luxembourg courts of the European Union will be used also for judgments delivered under their earlier names. The Court of Justice of the European Union will be abbreviated as CJEU, no abbreviation will be used for the General Court. The Treaty on the Functioning of the European Union will be referred to as TFEU.

The other four articles published by the author in this series are: "Mandatory Supply of Interoperability Information: The Microsoft Judgment" (2008) 9 European Business Organisation Law Review 305; "Exchange of Information and Opinions between European Competition Authorities and Courts - From a Swedish Perspective", published in International Antitrust Litigation: Conflict of Laws and Coordination (2012) by Hart Publishing and edited by Jürgen Basedow, Stephanie Francq and Laurence Idot; Swedish National report on "Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships" prepared for the congress of the International League of Competition Law (LIDC) in Bordeaux 2010 (can be downloaded from www.ligue.org and the Swedish National Report on "Should small and medium-sized enterprises (SMEs) be subject to other or specific competition rules" prepared for the LIDC congress in Prague 2012 (can be downloaded from www.ligue.org).

The author welcomes comments and suggestions related to this article on robert.molden@yarde.se.
1.2 Introduction to Swedish Public Procurement and Competition Law

Swedish public procurement in the classical sector is governed by the Swedish Public Procurement Act which entered into force in 2008. In this article, the Act will be referred to as LOU which is the established Swedish abbreviation for "Lag (2007:1091) om offentlig upphandling". LOU implements Directive 2004/18/EC concerning the coordination of award procedures in the classical sector. In this article, this Directive will be referred to as the Classical Sector Directive.

Swedish public procurement in the utilities sector is governed by the Swedish Procurement Act in the Areas of Water, Energy, Transports and Postal Services. In this article, the Act will be referred to as LUF, which is the established Swedish abbreviation for "Lag (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster". LUF implements Directive 2004/17/EC coordinating the procurement procedures in the utilities sector. In this article, this Directive will be referred to as the Utilities Sector Directive.

Swedish competition law is governed by the Swedish Competition Act of 2008 containing provisions prohibiting anti-competitive agreements and abuse of a dominant position, which constitute copies of Articles 101 and 102 TFEU. According to the travaux préparatoires behind the preceding Competition Act, the fact that the substantive provisions of the Swedish Competition Act are in line with those of EU competition law means that the Commission's
practice and jurisprudence of the Court of Justice can serve as guidance when interpreting the Swedish Competition Act.\textsuperscript{12}

The Swedish Supreme Court has, in a case concerning the existence of a dominant position,\textsuperscript{13} concluded that the substantive provisions of Swedish competition law are in line with the corresponding provisions of EU competition law to such a degree that it in fact does not matter whether Swedish or EU competition law is applied, in practice the analysis to be effected is the same.

Public enforcement of both Swedish competition law and public procurement law is entrusted to the Swedish Competition Authority (SCA – Konkurrensverket in Swedish)\textsuperscript{14} with its approximately 140 employees.

In the majority of competition cases handled by the Swedish Competition Authority, the procedure is very similar to that of the Commission’s DG Competition and to that of most other national competition authorities in the EU. The Swedish Competition Authority is entitled to take both final and interim injunction decisions on its own,\textsuperscript{15} ordering an on-going violation of Swedish or EU competition law to be terminated; such decisions can be combined with a penalty to be paid in case the antitrust offender would not comply with the injunction decision.\textsuperscript{16} Moreover, the Swedish Competition Authority is entitled to take decisions making voluntary commitments mandatory, under threat of penalty payments.\textsuperscript{17} The Authority is also entitled to issue non-mandatory fine orders.\textsuperscript{18}

These decisions by the Swedish Competition Authority can be appealed to the Swedish Market Court.\textsuperscript{19} An appeal against the judgment of the Swedish Market Court to the Swedish Supreme Court is not permitted; the Swedish Market Court is thus first and last court instance in the majority of cases when Swedish competition law is enforced by the Swedish Competition Authority.

The relevant provisions of the Swedish Competition Act prohibiting both horizontal and vertical anti-competitive cooperation between undertakings are the following:

\begin{itemize}
\item See prop. 1992/93:56, p. 21.
\item Judgment of the Swedish Supreme Court in Case T 2808-05 of 19 February 2008, The Ystad Harbour Case.
\item In September 2007, the enforcement activities of the Swedish National Board for Public Procurement (Näringsden för offentlig upphandling – NOU) were transferred to the Swedish Competition Authority.
\item Chapter 3, Articles 1 and 3 of the Swedish Competition Act.
\item Chapter 3, Article 1 and Chapter 6, Article 1 of the Swedish Competition Act.
\item Chapter 3, Article 4 and Chapter 6, Article 1 (2) of the Swedish Competition Act.
\item Chapter 3, Article 17 of the Swedish Competition Act; if the undertaking to which the fine order is addressed does not consent to the order within the time specified, the Swedish Competition Authority may initiate court proceedings concerning fines instead.
\item Marknadshofsten, www.marknadshofsten.se; see Chapter 7, Article 1 of the Swedish Competition Act.
\end{itemize}
"Chapter 2, Article 1
Agreements between undertakings shall be prohibited if they have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent, if not otherwise regulated in this act. This shall apply, in particular, to agreements which:
1. directly or indirectly fix purchase or selling prices or any other trading conditions; ..."^^

2. PUBLIC PROCUREMENT AND COMPETITION LAW APPLICABLE TO ACTIONS BY TENDERERS

2.1 Case Law on Public Procurement and Bid-rigging Cartels

Imagine that your company is contacted by another firm in the same industry with a proposal to make a joint tender in a specific public procurement proceeding. You feel concerned as you have a vague feeling that this may be problematic from a legal point of view, in particular as you think that your company could very well submit a tender on its own. For guidance, you therefore consult the Swedish Public Procurement Act where you find the following two provisions:

"LOU Chapter 1, Article 11
Groups of suppliers are entitled to apply to be allowed to submit a tender and to submit a tender. The contracting authority may not impose conditions requiring these groups to assume a specific legal form in order to be allowed to submit a request to participate or a tender."^^ (emphasis added)

"LOU Chapter 11, Article 12
A supplier may, where appropriate and for a particular contract, rely on the economic, technical and professional abilities of other undertakings. The supplier shall prove that the supplier will have at its disposal the resources necessary for the execution of the contract by producing a commitment from the undertakings in question or in some other way."^^ (emphasis added)

According to LOU, it is thus legal (i.e. not contrary to public procurement law) to submit joint tenders together with your competitors or to team up with your competitors as sub-contractors. However, such joint actions could be regarded as a bid-rigging cartel by the Swedish Competition Authority under Chapter 2, Article I of the Swedish Competition Act, with fines imposed up to 10 % of the co-operating companies’ turnover.

The following overview of cases will show that this is not only a theoretical risk. Indeed, the Swedish Competition Authority has taken a very tough

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^^ This Article implements Article 4 (2) of the Classical Sector Directive.
21 This Article implements Article 48 (3) of the Classical Sector Directive.
approach against bid-rigging even when effectuated openly or among small and medium-sized enterprises (SMEs).

2.1.1 The Asphalt Case of 2009 – Swedish Market Court

The major Swedish case on bid-rigging is the Asphalt Case of 2009. Eight undertakings were obliged to pay the highest total cartel fine ever imposed in Sweden, of approximately 500 million SEK. The Swedish Market Court found that the undertakings secretly had agreed on prices and partitioned the market for asphalt services in public procurement procedures related to the regions of Götaland and Svealand. The Swedish Market Court stated the following as to bid-rigging:

"The present case concerns cooperation related to public procurement. The essence of a public procurement proceeding is that the contracting authority, in reply to its contract specifications, expects offers from a number of tenderers which are independent from each other. The intention is thus that the tenderers submit offers which are not the result of any cooperation with competitors in order to enable the contracting authority to choose a cost-effective tender as possible. To the extent that tenders have been preceded by contacts between competitors, the competitive situation will be affected compared to the situation which otherwise would have been at hand.

A public procurement proceeding is thus supposed to lead to competition between the tenderers. That potential tenderers prepare and submit tenders independently of each other is thus an important part of the system. Tenders which are submitted as a result of cooperation reduce uncertainty of the outcome and very probably affect the competitive situation. ...

Agreements made by market participants in view of a public procurement proceeding as to who shall win the contract and as to the level of the tenders to be submitted must be regarded as having the object to prevent, limit or distort competition. The same applies to agreements as to market partition or limitation of production."  

2.1.2 The Power Supply Poles Case of 2009 – SCA

In 2009, the Swedish Competition Authority investigated a bid-rigging cartel between the SMEs ScanPole Sverige AB and Rundvirke Poles AB. The Swedish Competition Authority conducted a dawn raid against Rundvirke Poles AB after ScanPole Sverige AB had submitted a leniency application and provided information on the bid-rigging cartel. The two undertakings had cooperated in

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seven different public procurement proceedings regarding power supply poles made of wood. In particular, they had agreed that the undertaking losing the public procurement contract would supply half of the contract's value to the winning undertaking as a sub-contractor. This bid-rigging was found to infringe competition law and a non-mandatory fine order was proposed to Rundvirke Poles AB at the amount of 2 million SEK. Rundvirke Poles AB accepted this fine and thus avoided court proceedings by ways of settlement. This case was the first time a non-mandatory fine order was proposed by the Swedish Competition Authority. The fine proposed to Rundvirke Poles AB was considerably reduced due to its active cooperation in the investigation.

2.1.3 The Transport of Deceased Case of 2010 – SCA

Three Swedish funeral parlours, out of which two were SMEs, participated in bid-rigging concerning transports of deceased persons. In particular, they had submitted identical tenders in a public procurement proceeding effectuated by the City of Karlstad (1 698 SEK for day-time transports and 2 642 SEK for night-time transports of deceased persons). The three funeral parlours chose to accept the non-mandatory fine orders proposed by the Swedish Competition Authority, which amounted to approximately 40 000 SEK and 140 000 SEK for the two SMEs, to be compared to the fine set to the large enterprise which amounted to approximately 300 000 SEK.

2.1.4 The Burnt Waste Transport Case of 2011 – SCA

The Swedish Competition Authority proposed a non-mandatory fine order to ASFAB and Björn Hägglund's Maskiner AB. The undertakings had participated in a bid-rigging cartel in a public procurement proceeding regarding transport of burnt waste products from Vattenfall's combined power and heating plants in the two Swedish municipalities of Uppsala and Knivsta. In particular, the undertakings exchanged information on each other's offered prices and assigned each other as sub-contractors. The Swedish Competition Authority found that a bid-rigging cartel constitutes a very serious infringement of com-

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25 A non-mandatory fine order is non-mandatory in the sense that the undertaking against which it is directed may refuse to accept it. However, in such a situation, the Swedish Competition Authority would initiate legal proceedings before the Stockholm District Court with a view to obtain a judgment making payment of the fine mandatory. A non-mandatory fine order can thus be described as a kind of settlement procedure.


27 Fine order of the Swedish Competition Authority in Case 327/2010, of 1 December 2011.
petition law. The total value of sales in the relevant market for ASPAB was approximately 587 000 SEK and the fine was set at 293 000 SEK. The value of sales on the relevant market for Björn Hägglunds Maskiner AB was approximately 351 000 SEK and the fine was set at 175 000 SEK. The undertakings accepted the non-mandatory fine order and thus avoided court procedures.

2.1.5 The Tyre Case of 2010 — SCA

In November 2010, the Swedish Competition Authority filed a plaint against the two tyre companies Däckia AB and Euromaster AB for bid-rigging, requesting the Stockholm District Court to impose a total fine of approximately 9 000 000 SEK on the two undertakings. As opposed to the bid-rigging cases mentioned above, there was no secret bid-rigging in this case. Instead, Däckia AB and Euromaster AB openly supplied joint tenders in two public procurement proceedings for the supply of tyres and related services in 2005.

This case has not yet been decided by the Stockholm District Court. Of particular interest in this case, is the attitude taken by the Swedish Competition Authority as to the two undertakings capacity to submit independent tenders. The Authority states the following in its plaint:

"Däckia and Euromaster have stated that they lacked capacity to submit own tenders in public procurement proceedings as they did not have service stations in all those places where participating contracting authorities had activities.

Horizontal cooperation between undertakings which cannot carry out the project or activity related to the agreement on their own are outside of the scope of Chapter 2, Article 1 of the Swedish Competition Act. A condition for such an agreement to be outside the scope of Chapter 2, Article 1 of the Swedish Competition Act is that the undertakings do not have the possibility to submit tenders on parts of the procurement and that the cooperation does not extend to more undertakings than is necessary for the provision of services to be possible."  

The Swedish Competition Authority considered that the two undertakings had the capacity to submit independent bids. For this reason, the Authority concluded that the joint tender, in spite of being completely open and non-secret, constituted a bid-rigging cartel.

The reasoning of the Swedish Competition Authority is well in line with the relevant provisions of the Horizontal Guidelines, which stipulate the following:

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28 Plaint filed by the Swedish Competition Authority in Case 605/2010 on 24 November 2010.
29 However, in its judgment of 22 August 2012 in Case MD 2012:9, the Swedish Market Court has found that the alleged infringements are not time-barred.
30 Plaint to the Stockholm District Court submitted by the Swedish Competition Authority in Case 605/2010 on 24 November 2010.
"A commercialization agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than an effectively taking part in the co-operation, for example, because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually. As the parties to the consortia arrangement are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1)."  

2.2 Proposal for Amendment of the Swedish Public Procurement  
Highlighting the Unlawfulness of Joint Bids  

The provisions in the LOU which explicitly stipulate that tenderers are entitled to submit joint tenders or to assign each other as sub-contractors are misleading as the uninformed reader is made to believe that the provisions take precedence over potential competition law issues in this respect.  

For example, at a major public procurement conference in Stockholm earlier this year a speaker talked about his positive experience from coordinating tenders with other firms. Instead of each firm participating in every public procurement procedure, the speaker would agree with his colleagues in the other firms which of the firms should participate in a given public procurement proceeding. According to the speaker, such an arrangement saves considerable time and energy. He obviously had no idea, as probably a significant number of people in the audience, that such cooperation could be regarded as bid-rigging and as a serious infringement of competition law in case the Swedish Competition Authority would start an investigation. Knowledge about the competition law aspects may be expected to be particularly weak among SMEs which therefore risk high fines for bid-rigging.  

Therefore, it is proposed that the Swedish Public Procurement Act should be amended such as to contain an explicit warning and reference to the Swedish Competition Act. A possible wording could be: "Joint tenders and assignment of sub-contracts between competitors or potential competitors may under certain circumstances constitute an infringement of Chapter 2 Article 1 of the Swedish Competition Act or Article 101 TFEU."  

32 LOU Chapter 1, Article 11.  
33 LOU Chapter 11, Article 12.
2.3 Public Procurement and Anti-competitive Information Exchange

Anti-competitive information exchange between competitors constitutes an area of competition law, which has been under increased scrutiny by European competition authorities during the last years.

In early 2011, the European Commission published its new Guidelines on horizontal co-operation agreements containing a new chapter on information exchange between competitors. As we will see below, the issue of anti-competitive information exchange is particularly relevant in the area of public procurement.

The Commission introduces the issue of anti-competitive information exchange in its Horizontal Guidelines as follows:

"The purpose of this chapter is to guide the competitive assessment of information exchange. Information exchange can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organisation or through the companies' suppliers or retailers.

Information exchange takes place in different contexts. There are agreements, decisions by associations of undertakings, or concerted practices under which information is exchanged, where the main economic function lies in the exchange of information itself. Moreover, information exchange can be part of another type of horizontal co-operation agreement (for example, the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges should be carried out in the context of the assessment of the horizontal co-operation agreement itself.

Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries, thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other’s best practices. Sharing of information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.

However, the exchange of market information may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination.

34 Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines).
Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel.\textsuperscript{35}

From a legal perspective, anti-competitive information exchange can be divided into two categories: (i) connected information exchange and (ii) pure information exchange.

(i) Connected information exchange is information exchange which is connected respectively auxiliary to an overriding cartel agreement. When two or more undertakings agree on certain cartel prices, there will subsequently be strong incentives for each undertaking to charge somewhat lower prices than the agreed cartel price, in order to take some business from the other cartel members. So-called cheating is thus likely to occur and without an effective monitoring device in place, most cartels would quickly erode. For example in the Organic Peroxides cartel case, the cartel members hired a private consultancy firm – AC Treuhand – to monitor the actual prices charged by the cartel members, which ensured the cartel's effective operation – until it was finally detected by the European Commission.\textsuperscript{36}

What, then, about members of a bid-rigging cartel? To what extent do they need to hire consultancy firms or find other ways to monitor that the cartel members fulfil their part in the cartel agreement? This is not necessary. It is the contracting authority itself which actually carries out the function of cartel monitoring. This is so because in a bid-rigging cartel it is not possible for any cartel member to cheat secretly, that is to offer a lower price than agreed without detection by the other cartel members. Any such attempt would fail, as tenderers in a public procurement proceeding are entitled to get information from

\textsuperscript{35} Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines), paras 55–59.

\textsuperscript{36} The General Court described the activities of the cartel facilitator as follows: "[The cartel was founded in 1971 by a written agreement ... between three producers of organic peroxides ... The aim of that cartel was, inter alia, to preserve the market shares of those producers and to coordinate their price increases. Meetings were held regularly to ensure the proper functioning of the cartel. Under the cartel, .... AC-Treuhand AG, [was] entrusted ... with, inter alia, storing certain secret documents relating to the cartel, such as the 1971 agreement, on their premises; collecting and treating certain information concerning the commercial activity of the three organic peroxide producers; communicating to them the data thus treated; and completing logistical and clerical-administrative tasks associated with the organisation of meetings between those producers. ....", (Judgment of the General Court in Case T-59/04, AC-Treuhand AG v Commission, of 8 July 2008, para. 2.)
the contracting authority on the price offered by the winning tenderer. This is one reason why cartels are easier to organise and therefore probably more likely to occur in relation to public procurement proceedings than on the market in general.

(ii) *Pure information exchange* is information exchange between competitors which is anti-competitive in itself without being connected or auxiliary to an overriding cartel agreement. In its Horizontal Guidelines, the Commission makes clear that such information exchange not necessarily needs to be reciprocal, but the transfer of strategic information from one undertaking to another may be enough to trigger competition law:

"A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour. For example, mere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data."

An important issue is thus which kind of information can be classified as strategic, as only the exchange of strategic information can be prohibited under competition law. The term "strategic information" is defined by the European Commission in its Horizontal Guidelines as follows:

"The exchange between competitors of strategic data, that is to say, data that reduces strategic uncertainty in the market, is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete. Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most

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strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition. The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.\textsuperscript{38}

In public procurement, tenderers are normally required to submit a large amount of information on the undertaking as well as on the products and services offered. Some of this information may be strategic in the competition law sense set out above. To what extent are such competition-related concerns taken into account in Swedish case law concerning the protection of business secrets related to public procurement proceedings? This issue will be analysed in the following sub-section. To what extent may competition be distorted by undertakings having a right to obtain information on their competitors’ tenders?

2.4 Public Procurement and the Protection of Sensitive Information

2.4.1 Swedish and EU law applicable to the protection of sensitive information in public procurement proceedings

A tenderer requesting information on the tenders of competitors can choose to base its request either on LOU or on the Swedish Freedom of the Press Act (Tryckfrifrihetsförordningen) in combination with the Swedish Public Access to Information and Secrecy Act (Offentlighets- och sekretesslagen, 2009:400, hereafter referred to as OSL).

According to LOU Chapter 9, Article 9, “a contracting authority shall as soon as possible inform the candidates and the tenderers in writing of the decisions reached concerning concluding a framework agreement or awarding a contract and of the grounds for the decisions”. According to LOU Chapter 9, Article 10, “a contracting authority shall provide information about the reasons for a supplier’s application having been rejected or for a tender having been rejected to a candidate or tenderer who requests such information”.

The general rule of the Swedish Freedom of Press Act is that documents held by public authorities are official documents and that anyone is entitled to have access to them if the document is not protected by secrecy.\textsuperscript{39} According to OSL Chapter 2, Article 3, also documents held by companies owned by municipalities or counties shall be considered as official documents. However, documents

\textsuperscript{38} Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines), para. 86.

\textsuperscript{39} Chapter 2 Article 1 of the Swedish Freedom of the Press Act.
held by companies owned by central Government are not considered to be official documents. This means that if a public procurement proceeding is handled by a company owned by central Government, it is not possible for tenderers to request any documents submitted by their competitors under the very generous rules of the Swedish Freedom of the Press Act and the OSL. Instead, tenderers can only rely on the limited rights to obtain information granted under LOU — the Swedish Public Procurement Act.

The duty to ensure secrecy under EU law is stated in Article 6 of the Classical Sector Directive which stipulates:

"Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35 (4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, such information includes, in particular, technical or trade secrets and the confidential aspects of tenders."

According to OSL Chapter 19, Article 3, information provided in a public procurement proceeding is strictly protected by secrecy until the contracting authority has taken its award decision.

Once an award decision has been taken, the information submitted by a tenderer is protected by two alternative provisions of OSL. If the contracting authority is a company owned by a municipality or county, secrecy applies to information concerning an undertaking’s business or activities if it can be assumed that the undertaking would be harmed if the information is revealed.\(^40\) \(^41\)

If the contracting authority is a central Government authority, a municipality or a county, secrecy applies if there is a particular reason to assume that the undertaking would be hurt if the information is revealed.\(^41\)

In the following sub-sections, we will look at a number of Swedish judgments concerning the protection of business secrets in relation to public procurement proceedings, in particular as to how the competition aspects have been handled by the Swedish court. However, before that, the leading EU case in this respect, the Varec Case, should be briefly presented.

2.4.1.1 The Varec Case of 2008 — CJEU\(^42\)

In the Varec Case, the CJEU gave a preliminary ruling referred to it from a Belgian court. The case concerned review procedures and confidential information

\(^{40}\) OSL Chapter 31 Article 17.

\(^{41}\) OSL Chapter 31 Article 16.

\(^{42}\) Judgment of the CJEU in Case C-450/06, Varec SA v État belge, of 14 February 2008.
in public procurement proceedings. The main issue at hand was whether or not the review body could access confidential information relied upon by one party, without giving access to this information to the other party. The CJEU stated that the “principal objective of the Community rules in [the field of public procurement law] is the opening up of public procurement to undistorted competition in all the Member States.” The CJEU went on stating that “In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an on-going procurement procedure or in subsequent procedures.” The CJEU concluded that the national court was entitled to assess confidential information without giving the other party access to the information, as the CJEU found that the right to access information in judicial proceedings shall be balanced against the right of third parties to protect their confidential business secrets in order to maintain, among other things, fair competition within the field of public procurement.

Recent Swedish case law on the protection of sensitive information in public procurement proceedings will be presented in the following two sub-sections, of which the first presents cases where access to information has been denied by Swedish administrative courts, and the second sub-section presents cases where Swedish administrative courts have granted access to information which the contracting authority in question had considered to be protected by secrecy under OSL, the Swedish Public Access to Information and Secrecy Act.

In case a contracting authority decides to deny access to an official document because of secrecy, such a decision can be appealed to one of the four Swedish administrative courts of appeal. In such a proceeding, the contracting authority does not have the status of party, which means that only the undertaking demanding access to the official document can appeal against a judgment from an administrative court of appeal to the Swedish Supreme Administrative Court of Appeal.

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44 Judgment of the CJEU in Case C-450/06, Varc SA v État belge, of 14 February 2008, para. 34.
45 Judgment of the CJEU in Case C-450/06, Varc SA v État belge, of 14 February 2008, para. 35.
Robert Molden

2.4.2 Swedish case law on denied access to sensitive information submitted by competitors

2.4.2.1 The Vägverket Case of 2007 – Supreme Administrative Court

Peab Asfalt AB requested access to tender documents concerning paving work. Vägverket denied access claiming that disclosure could harm the other tenderer. The Supreme Administrative Court upheld the ruling of the Administrative Court of Appeal, stating that the purpose of Peab’s request (to examine the other tenderers’ pricing in order to submit more competitive tenders in the future) was reason enough to assume that the other tenderer might be harmed. Access to the information was therefore denied by the Swedish Supreme Administrative Court.

2.4.2.2 The Banverket Case of 2008 – Sundsvall Administrative Court of Appeal

Atkins Sverige AB requested access to documents containing personal data and hourly rates. Atkins claimed that the records in question were already public on the webpage of the tenderer in question. The Sundsvall Administrative Court upheld Banverket’s decision to deny access because of secrecy, stating that the personal data, in combination with the number of hours and hourly rates, was reason enough to assume that the tenderer could suffer damages if the information was to be handed over to Atkins.

2.4.2.3 The Mjölby Kommun Case of 2008 – Jönköping Administrative Court of Appeal

Mr Järpsten requested access to the contract between Mjölby and the tenderer which had been awarded the contract in the public procurement proceeding in question. In particular, Mr Järpsten requested access to the price per unit list. Mjölby Kommun took a decision denying access to the list because of secrecy. The Jönköping Administrative Court of Appeal upheld Mjölby Kommun’s decision, stating that the prices in the list concerns competitive services and is

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46 Judgment of the Supreme Administrative Court in Case 4753-06, Peab Asfalt AB, of 30 October 2007.
47 Judgment of the Sundsvall Administrative Court of Appeal in Case 2831-08, Atkins Sverige AB, of 4 November 2008.
part of the tenderer’s business secrets. If disclosed, the list could be used at later procurements and therefore harm the bidder.

2.4.2.4 The Försvarsmaterielverk Case of 2012 – Stockholm Administrative Court of Appeal

TeliaSonera AB requested Försvarsmaterielverk to grant access to a price annex submitted by another tenderer in a public procurement proceeding concerning fixed and mobile operator and transmission services. Försvarsmaterielverk took a decision denying access for the following reason: since the few operators on the Swedish telecommunications market act under strong competition the release of documents regarding prices, considerations and solutions could prove damaging. The Stockholm Administrative Court upheld the decision, stating that the high level of market competition in combination with the possible damage to other tenderers if their pricing strategy was revealed, was sufficient enough to deny access to the official documents in question.

2.4.2.5 The Västrafik AB Case of 2012 – Jönköping Administrative Court of Appeal

Mr Schyllander at Roschier Advokatbyrå AB requested Västrafik AB to grant access to a capacity contract belonging to a public procurement proceeding. Västrafik AB granted partial access to the document, but denied access to data regarding compensations, payments and other costs. Mr Schyllander complained against Västrafik’s decision to the Jönköping Administrative Court of Appeal. The Court upheld Västrafik’s decision. In a short statement, the Court concluded that since the appellant’s purpose was to use the information in a future appeal concerning contractual validity, there was a particular reason to assume that disclosure would be harmful to the other tenderer.

2.4.2.6 The Skånetrafiken Case of 2012 – Göteborg Administrative Court of Appeal

This case concerned the awarding of a contract regarding order registrations within the field of taxi transports. One of the tenderers demanded access to

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49 Judgment of the Stockholm Administrative Court of Appeal in Case 6701-11, TeliaSonera AB, of 2 January 2012.
50 Judgment of the Jönköping Administrative Court of Appeal in Case 1076-12, Fredrik Schyllander, of 19 April 2012.
51 Judgment of the Göteborg Administrative Court of Appeal in Case 5310-12, of 11 July 2012.
information regarding, e.g., time schedules and quality plans from the other tenderers in order to evaluate the scores given to each of the tenderers during the evaluation. Skånetrafiken refused access to these documents and claimed that the documents contained information of such a nature that the undertakings concerned could be hurt if the information was to be handed over. The decision of Skånetrafiken to deny access to the information was upheld by the Göteborg Administrative Court of Appeal.

2.4.2.7 The Sigtuna Kommun Case of 2012 – Stockholm Administrative Court of Appeal

Svenska Väg AB requested Sigtuna Kommun to grant access to detailed pricelists submitted by two competing tenderers in a public procurement proceeding. Sigtuna Kommun took a decision denying access to the detailed price lists for the reason that price constitutes the main parameter of competition in the kind of public procurement proceeding at hand. Sigtuna Kommun’s decision was on appeal upheld by the Stockholm Administrative Court of Appeal.

2.4.3 Swedish case law on granted access to sensitive information submitted by competitors

2.4.3.1 The Arbetsförmedlingen Case of 2009 – Stockholm Administrative Court of Appeal

Manpower AB requested Arbetsförmedlingen to grant access to price lists concerning the procurement of staffing services. Arbetsförmedlingen denied access, stating that in case the procurement proceeding was to be redone, publication could harm the bidder since it would reveal sensitive information about the bid as well as strategic methods used by the bidder. On appeal, the Stockholm Administrative Court of Appeal granted Manpower AB access to the documents. The Court stated that the mere fact that the procurement procedure might need to be redone could not be regarded as a sufficiently concrete risk of damage. The Court also stated that since the tenderer which had submitted the price lists did not ask for confidentiality, Arbetsförmedlingen did not have any reason to deny access.

52 Judgment of the Stockholm Administrative Court of Appeal in Case 3214-12, Svenska Väg AB, of 20 August 2012.
53 Judgment of the Stockholm Administrative Court of Appeal in Case 7379-09, Manpower AB, of 18 November 2009.
2.4.3.2 The Familjebostäder Case of 2010 – Göteborg Administrative Court of Appeal\textsuperscript{54}

Familjebostäder i Göteborg AB was requested to grant access to all information regarding the implementation of a public procurement contract. Familjebostäder AB took a decision denying access to the requested information. On appeal, the Göteborg Administrative Court of Appeal granted access to the official documents in question, arguing that the information in these requested documents was of such a general nature that it could not be protected by secrecy. Therefore, the Court referred the case back to the contracting authority to make a new assessment of any reasons for secrecy.

2.4.3.3 The Västrafik AB Case of 2011 – Jönköping Administrative Court of Appeal\textsuperscript{55}

Buss i Väst AB requested access to notes from three different negotiation meetings between Västrafik AB and competitors to Buss i Väst concerning the public procurement of transport services. Västrafik denied access due to the consideration that the transfer of information in question would risk harming other tenderers. On appeal, the Jönköping Administrative Court granted Buss i Väst AB partial access to the requested information.

2.4.4 Conclusions on Swedish case law on public procurement and the protection of business secrets

This overview over recent case law shows that Swedish administrative courts in many cases do take into account the distortion of competition which would arise if strategic information submitted by one tenderer in a public procurement proceeding is handed over to competing tenderers. However, case law is far from settled and further clarifications from the Swedish Supreme Administrative Court would be welcome.

\textsuperscript{54} Judgment of the Göteborg Administrative Court of Appeal of Göteborg in Case 1577-10, Ingegner Nyman and Johan Dahlström, of 12 July 2010.

\textsuperscript{55} Judgment of the Jönköping Administrative Court of Appeal in Case 3702-11, Buss i Väst AB, of 30 December 2011.
3. FRAMEWORK AGREEMENTS AND COMPETITION ASPECTS

3.1 Competition Aspects of Framework Agreements under Art 32 (2) of the Classical Sector Directive

As to competition aspects of framework agreements, Article 32 (2) of the Classical Sector Directive stipulates the following:

"The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement. Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition."

The first element in this quotation concerns the issue of too long framework agreements, which will be analysed in the following sub-section.

The second element in this quotation is of relevance for the issue of too large framework agreements, which will be analysed subsequently.

3.2 Too Long Framework Agreements

3.2.1 Swedish and EU law on too long framework agreements

The provisions of Article 32 (2) of the Classical Sector Directive have been implemented into Swedish law by LOU Chapter 5, Article 3 which stipulates:

"A framework agreement may only run for a period of more than four years if there are special reasons."

In the subsequent sub-section, recent Swedish case law as to framework agreements having a duration of more than four years will be presented.

3.2.2 Swedish case law on too long framework agreements

3.2.2.1 The Vaccination Case of 2011 – Stockholm Administrative Court of Appeal\(^{56}\)

The Swedish counties organised a public procurement proceeding concerning vaccination services by way of a framework agreement. The duration of the framework agreement was two years, which could be prolonged by 24 months and then an additional six months. The maximum duration of the framework

\(^{56}\) Judgment of the Stockholm Administrative Court of Appeal in Case 5609–5629-10, Sanofi Pasteur MSD S.N.C. v Stockholms läns landsting and Others, of 23 March 2011.
agreement would thus be 4 years and six months, i.e. six months longer than the four years stipulated in LOU Chapter 5, Article 3. The Stockholm Administrative Court of Appeal found that the counties had not shown any special reasons related to the object of the agreement for applying a duration of more than four years. Potential health hazards related to the absence of contract during a renewed public procurement proceeding should not be considered, as such reasons do not relate to the object of the framework agreement. As to the effects on competition of too long framework agreements, the Court found that "the longer duration may limit competition on the market in question in an undue way and that the claimant therefore could suffer harm." On these grounds, the Court decided that the public procurement proceeding should be redone.

3.2.2.2 The Insurance Case of 2011 – Karlstad Administrative Court

The cities of Filipstad and Kristinehamn undertook a public procurement proceeding concerning the administration of pensions and insurance services. The framework agreement was to have a duration of three years, with possible prolongations of up to three additional years. The maximum total duration of the framework agreement was thus six years. The Karlstad Administrative Court found that the cities had not proven the existence of any special reasons justifying such a long duration. The Court therefore decided that the public procurement proceeding had to be redone.

3.2.2.3 The SharePoint Case of 2012 – Malmö Administrative Court

VA Syd undertook a public procurement proceeding concerning SharePoint development services governed by LUF. The duration of the framework contract was to be two years plus potential prolongations leading to a maximum duration of seven years. The Malmö Administrative Court stated that there is no explicit upper limit to the duration of framework of agreements in the Utilities Directive and LUF, but that the provisions of a maximum time duration of four years stipulated by LOU could be taken as a point of departure when

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57 Page 12 of the judgment.
58 Judgment of the Karlstad Administrative Court in Case 2873-11 E, KPA Pensionsservice AB v Filipstad kommun and Kristinehamn kommun, of 1 September 2011. The judgment was appealed to the Göteborg Administrative Court, which rejected the appeal on procedural grounds (Judgment of the Göteborg Administrative Court of Appeal in Case 6427-11, Livsföräldringsselskabet Skandia and Skandinavisk Administratjon AB v Filipstad kommun, of 9 November 2011).
59 Judgment of the Malmö Administrative Court in Case 3065-12 E, Bouwey Syd AB v VA SYD, of 4 May 2012.
assessing framework agreements with long duration under LUF. The Court then stated the following:

"The possibilities to use framework agreements having a duration of more than four years are probably more far-reaching in public procurement proceedings under LUF than under LOU, because contracts governed by LUF often by their nature are complex, of very high value and of significance for important functions in society, which could justify a longer duration. However, the use of framework agreements may not lead to adverse effects on competition. The seven years' duration of the framework agreement applied by VA Syd is remarkably long in relation to the object of the procurement proceeding. The Administrative Court has not found any circumstances justifying such a long duration of the framework agreement. The long duration of the framework agreement as applied by VA Syd has therefore restricted competition in an un-proportionate way and has infringed [the general principles of public procurement stipulated in] LUF Chapter 1, Article 24".60 (author’s translation, emphasis added)

On these grounds, the Court decided that the public procurement proceeding had to be redone.

3.2.3 Conclusions on the Swedish case law on too long framework agreements

It follows from Swedish case law that framework agreements with durations exceeding four years are compatible with LOU only if the contracting authority can prove that there are special reasons related to the object of the procurement proceeding to justify the long duration. Moreover, it appears that it is quite difficult for contracting authorities to prove this.

3.3 Too Large Framework Agreements

3.3.1 Swedish and EU law on too large framework agreements

As mentioned above, Article 32 (2) of the Classical Sector Directive stipulates that “contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.” As very large framework agreements may have the effect of restricting competition, too large framework agreements may infringe Article 32 (2) of the Classical Sector Directive.

Whereas the provisions of Article 32 (2) of the Classical Sector Directive concerning too long framework agreements have been implemented into Swedish law as set out in the previous section, the provisions of Article 32 (2) of

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60 Page 7 of the judgment.
relevance for too large frameworks, i.e. the duty not to restrict competition, have not been explicitly implemented into the Swedish Public Procurement Act – LOU.

However, it follows from the travaux préparatoires that the Swedish legislator intended that also the provisions concerning the duty not to restrict competition embodied in Article 32 (2) of the Classical Sector Directive should be applicable in Swedish law.

The travaux préparatoires states the following:

"According to Article 32 (2), contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. This does not refer to the contracting authority's intention as to the use of framework agreements, but to the effects which can be stated. The contracting authority therefore must consider how to design a framework agreement in order to obtain competition. For this reason it may, for example, be inappropriate to sign joint framework agreements with few suppliers on behalf of all contracting authorities, as this can lead to the creation of a situation comparable to a monopoly.\(^6\)\(^1\) (author's translation, emphasis added)

In the draft legislation sent to the Swedish Council on Legislation (Lagrådet), there was an explicit provision implementing the provisions of Article 32 (2) of the Directive as to the duty not to restrict competition. However, the Swedish Council on Legislation considered such a provision to be superfluous, as it considered that the duty not to restrict competition in relation to framework agreements already follows from the general principles of public procurement listed in LOU Chapter 1, Article 9.\(^6\)\(^2\) In view of the Council's opinion, the Swedish legislator decided not to include any explicit provision concerning provisions of Article 32 (2) of the Directive as to the duty not to restrict competition. However, it clearly follows from the travaux préparatoires that the Swedish legislator intended to give full effect to these provisions.

### 3.3.2 Central purchasing bodies in Sweden

One reason why large framework agreements are relatively common in Sweden is that, to a large extent, central purchasing bodies are used by contracting authorities for joint procurement proceedings.\(^6\)\(^3\)

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\(^6\)\(^1\) Prop 2006/07:128, p. 172.

\(^6\)\(^2\) Prop 2006/07:128, p. 333.

Robert Molds

The legal ground for central purchasing bodies is Article 11 of the Classical Sector Directive, according to which:

"Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body… Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it."

These provisions have been implemented into Swedish law (LOU Chapter 2, Article 9 a).

Government authorities are requested to use a specific central purchasing body, the Statens inköpscentral at Kammarkollegiet, for procurements to the extent stipulated by Articles 2–4 in the Swedish Decree on Co-ordination of Purchases by Government Authorities.

"For goods and services which Government authorities procure often, in large quantities or which amount to high values, there shall be framework agreements or other joint agreements in place in order to render procurement more effective. In this respect, the possibility of small and medium-sized enterprises to participate in the public procurement proceedings shall be taken into account.

A Government authority shall use such agreements referred to in Article 2 if the authority does not find that another form of agreement is better overall.

Kammarkollegiet shall work for such agreements referred to in Article 2 to be entered into. If a Government authority intends to procure without using those agreements referred to in Article 2, it shall inform Kammarkollegiet of the reasons for this."

The Swedish Association of Local Authorities and Regions (Sveriges kommuner och landsting, SKL) operate a central purchasing body called SKL Kommentus Inköpscentral AB. All of Sweden’s 290 municipalities and 20 counties may use this central purchasing body instead of conducting a public procurement proceeding on their own. However, as opposed to Government authorities, there are no legal provisions requiring municipalities and counties to use this central purchasing body. It is also common that municipalities conduct joint procurement proceedings together with one or more other neighbouring municipalities. For example, the central purchasing body of the City of Göteborg, Göteborgs stads upphandlingsbolag, also offers its procurement services to certain neighbouring municipalities.

64 www.avropa.se is the website of Statens inköpscentral at Kammarkollegiet.
66 www.sklkommentus.se is the website of SKL Kommentus Inköpscentral.
67 www.uhb.goteborg.se is the homepage of Göteborgs stads upphandlingsbolag.
3.4 Case Law on Too Large Framework Agreements

3.4.1 The Children Dental Care Case of 1999 – Supreme Administrative Court\textsuperscript{68}

The county of Kronoberg undertook a public procurement proceeding concerning the provision of dental services to approximately 22,000 children and young persons up to the age of nineteen. The framework agreement’s initial duration was to be three years, with an option to prolong it up to a total duration of six years. The dental services were to be performed in ten specific geographical areas. Only tenders covering all of the ten geographical areas were to be accepted. The Swedish Supreme Administrative Court found that the procurement proceeding was designed in such a way that, in practice, only the incumbent service provider had the possibility to submit a tender. The Court then stated the following:

"The Swedish Supreme Administrative Court considers that the county, by requesting that tenders should cover all of the dental care in question, infringed the provisions of Chapter 1, Article 4 of [the former] Swedish Public Procurement Act\textsuperscript{69} as to the obligation to conduct procurement proceedings in a way which utilizes the existing possibilities for competition and in a business-like way. No relevant reasons for not accepting tenders also on parts of the dental care in question have been advanced." (author’s translation and emphasis)

On these grounds, the Swedish Supreme Administrative Court decided that the public procurement proceeding had to be redone.\textsuperscript{70}

3.4.2 The Nursing Home Case of 2009 – Göteborg Administrative Court of Appeal\textsuperscript{71}

Kommunförbundet Skåne undertook a public procurement proceeding concerning nursing home services. Björkviks Vården AB argued, among other things, that the procurement proceeding infringed the Swedish Public Procure-

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\textsuperscript{68} Judgment of the Supreme Administrative Court in Case 1999, RÅ not 1, Kronobergs läns landsting v Anders Englund Tandläkarklinik AB, of 12 January 1999.

\textsuperscript{69} Chapter 1, Article 4, first paragraph, of the former Swedish Public Procurement Act, Lag (1992:1528) om offentlig upphandling, stipulated as follows: “Procurement proceedings shall be conducted in a way which makes use of the existing possibilities for competition and in a business-like way.”

\textsuperscript{70} The Swedish Supreme Administrative Court also mentioned two additional grounds: The duration of the framework agreement of up to six years was too long and the time available for submitting tenders was too short.

\textsuperscript{71} Judgment of the Göteborg Administrative Court of Appeal in Case 6411-08, Björkviks Vården AB v Kommunförbundet Skåne, of 7 April 2009. The author of this article worked at that time as Associate Judge at the Göteborg Administrative Court of Appeal and served as one of three judges giving judgment in this case.
ment Act (LOU), because of the very wide geographic area to be covered by the framework agreement, which, according to Björkvik's Vårheim AB, would lead to less competition in the long run. The Göteborg Administrative Court of Appeal stated the following:

"As to Björkvik’s argument that the public procurement proceeding because of its size (geographic dimension) will restrict competition in the long run, the Göteborg Administrative Court of Appeal finds as follows. According to LOU Chapter 1, Article 9, contracting authorities shall treat suppliers in an equal and non-discriminatory manner and shall conduct procurements in a transparent manner. Furthermore, the principles of mutual recognition and proportionality shall be observed in connection with procurements. Effective competition both in the short as in the long run is one of the purposes of competition law. The fact that the size of a public procurement proceeding may lead to a situation where tenderers which are not awarded a contract risk market exit, which in its turn may lead to less competition in the future, is in view of the Göteborg Administrative Court of Appeal not a fact which in itself can constitute an infringement of the said principles."72 (author's translation and emphasis)

This judgment is interesting as it states that effective competition both in the short as in the long run is one of the purposes of competition law. Nevertheless the Göteborg Administrative Court of Appeal finds that long-term negative effects of competition are not covered by the general principles of public procurement. In other words, contracting authorities could not be compelled by administrative courts applying the Swedish Public Procurement Acts to take into account the potential long-run adverse effects on competition when determining the size of a public procurement proceeding.

3.4.3 The Skåne Postal Services Case of 2011 — Göteborg Administrative Court of Appeal73

Kommunförbundet Skåne conducted a public procurement proceeding concerning the provision of postal services to all municipalities in Skåne and 43 companies owned by municipalities. One tenderer — Bring CityMail Sweden AB — complained, arguing that the criterion demanding tenderers to leave an offer on all sub-categories to have a chance of being awarded the contract was both un-proportionate and a hindrance to competition. The Göteborg Administrative Court of Appeal agreed and found this condition to be in breach of the

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72 Page 13 of the judgment. The Göteborg Administrative Court of Appeal found that the public procurement proceeding had to be redone on other grounds related to the principles of transparency and equality.

73 Judgment of the Göteborg Administrative Court of Appeal in Case 3952-10, Kommunförbundet Skåne v Bring CityMail Sweden AB, of 24 January 2011.
principle of proportionality. The Göteborg Administrative Court of Appeal in this respect upheld the prior judgment by the Administrative District Court of Malmö.\footnote{74} The Malmö Administrative District Court had stated that in order to be in line with the principle of proportionality the public authority has to clearly state, when setting requirements, why a certain requirement is necessary to fulfil the purpose of the public procurement contract. The Malmö Administrative Court also stated that the contracting authority has to bear in mind that it has to utilize competition as far as possible so that the range of potential tenderers is not decreased more than necessary.\footnote{75}

3.4.4 The SKL Kommentus Printer and Copying Machines Case of 2012

-- Legal opinion of the Swedish Competition Authority\footnote{76}

SKL Kommentus Inköpscentral AB conducted a joint public procurement procedure concerning printers and copying machines. The framework agreement was to cover 21 different geographic areas and it was possible to submit tenders for individual geographical areas. In an annex to the contract specifications, 70 contracting authorities were listed, all of which had indicated an interest to adhere to the framework agreement. Another annex contained the name of no less than 1 077 contracting authorities which had not indicated any interest to adhere to the framework agreement, but should have the possibility to join the framework agreement at a later stage. Toshiba TEC Nordic AB complained to the Stockholm Administrative Court\footnote{77} which requested a legal opinion from the Swedish Competition Authority. In its legal opinion, the Swedish Competition Authority found that it was contrary to public procurement law to "use a list of contracting authorities which may order items from the framework agreement without the contracting authorities actively having committed themselves to do so in advance or that such orders could be anticipated by other means".\footnote{78}

\footnote{74} Judgment of the Administrative Court of Malmö in Case 9491-10 of 23 July 2010.
\footnote{75} For an in-depth analysis of this case, see Carl Bekwall and Per-Owe Arvesson, "Konkurrensbegränsande ramavtal, med särskild intäktning på postmarknaden – analys", published on www.jpifonnet.se on 9 February 2011. The authors acted as attorneys to Bring Citymail AB.
\footnote{76} Legal opinion of the Swedish Competition Authority of 30 May 2012, ref. 285/2012, requested by the Stockholm Administrative Court in Case 1857-12, Toshiba TEC Nordic AB v SKL Kommentus Inköpscentral AB. This excellent legal opinion was drafted by Legal Counselor Daniel Johansson and adopted by the director general of the Swedish Competition Authority, Dan Spåblom.
\footnote{77} The case number at the Stockholm Administrative Court is 1857-12. At the time this article was finalised, the Court had not yet delivered its judgment.
\footnote{78} Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, para. 54.
The legal opinion of the Swedish Competition Authority contains the following very interesting general analysis on the duty not to restrict competition under Article 32 (2) of the Classical Sector Directive:

"The Swedish Competition Authority considers that the general clause contained in Article 32 (2) fifth subparagraph of the Classical Sector Directive according to which framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition, can be regarded as counterweight to the risks of adverse effects on competition which framework agreements under certain circumstances normally can entail. The existence of the general clause can be regarded as a way to highlight the importance to respect the general principles when conducting public procurement proceedings by way of framework agreements.

However, the Swedish Competition Authority does not share the view of the Swedish Council on Legislation and the Swedish Government that the general clause in Article 32 (2) fifth subparagraph only states what is already stipulated by the general principles of public procurement in LOU Chapter 1, Article 9.

The Swedish Competition Authority considers that the general clause in Article 32 (2) fifth subparagraph instead should be interpreted in a way — which goes beyond what is already stipulated by the general principles of public procurement law — by imposing other and more far-reaching obligations as to the actions of contracting authorities related to public procurement proceedings by way of framework agreements. That the EU legislator has prescribed such an order is in line with the inherent risks of adverse effects on competition which procurements by way of framework agreements under certain circumstances normally can entail.

For example, very large framework agreements which — without any objectively acceptable reasons — exclude other suppliers or which can seriously harm competition through suppliers not being awarded a contract risk to vanish from the market in question, could be subject to intervention by administrative courts of appeal under Article 32 (2) fifth subparagraph of the Classical Sector Directive even if the general principles of public procurement under LOU Chapter 1, Article 9 have not been infringed. In such a case it may be necessary for the court to give direct effect to the general clause in Article 32 (2) fifth subparagraph of the Classical Sector Directive, because it has not been implemented into LOU and LOU lacks provisions which can be interpreted in accordance with the wording and purpose of the general clause."

The circumstances discussed by the Swedish Competition Authority — risk for adverse effects on competition in the long run caused by suppliers not being awarded a contract having to exit from the market — may have been present in the Nursing Home Case of 2009 mentioned above. Here, the Göteborg Administrative Court of Appeal, in view of the author (who served as one of

79 Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, paras 33–36.
80 Judgment of the Göteborg Administrative Court of Appeal in Case 6411-08, Bjerkeviks Vårdhem AB v Kommunförbundet Skåne, 7 April 2009. The author of this article worked at that time as Associate Judge at the Göteborg Administrative Court of Appeal and served as one of three judges giving judgment in this case.
three judges in the case), rightly found that none of the general principles referred to in LOU Chapter 1, Article 9 impose any obligation on a contracting authority to consider such long-run effects on competition which may materialise after a given framework agreement comes to an end. Moreover, it is not astonishing that the Göteborg Administrative Court of Appeal refrained from discussing whether to give direct effect to Article 32 (2) fifth subparagraph of the Classical Sector Directive and to consider whether the potential long-run anti-competitive effects were contrary to that provision. One reason for this is that the Swedish Public Procurement Act is generally perceived as compatible with the Classical Sector Directive in the Swedish judicial community. In practice, it will therefore normally take a precedent judgment from the Swedish Supreme Administrative Court or a legal opinion from the Swedish Competition Authority — such as in the present case — before Swedish administrative courts start applying provisions which are not in line with the Swedish Public Procurement Act, by way of giving direct effects to provisions in the directives.

As to the duty not to restrict competition under Article 32 (2) of the Classical Sector Directive applied to the circumstances of the case, the Swedish Competition Authority stated:

"As a result of the framework agreement, competition for a potentially very large part of the entire public sector's purchases of printers and photocopiers machines as well as related services take place at a single occasion, instead of market participants are given the possibility to compete for supplies at different times during these four years.

Moreover, as to goods and services covered by the framework agreement, only orders concerning exactly those products and services can be placed, and only in the way stipulated in the framework agreement; these will exclude alternative products, designs and solutions which could have met the needs of the contracting authorities as well or better. This leads to a situation where the suppliers' incentives to create innovative solutions, better processes and better quality will be diminished.

The very large amount of uncertain authorities entitled to place orders based on the framework agreement in the second annex (1,077 authorities) as compared to the number of authorities entitled to place order (70 authorities) makes it difficult for many suppliers — in particular small and medium-sized — to even calculate reasonable tender prices and to plan which resources are needed in order to deliver the amounts which subsequently may be ordered.

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In conclusion, the Swedish Competition Authority considers, in view of what has been stated in paragraphs 57–59 above, that the public procurement proceeding by way of framework agreement conducted by SKL Kommersial Inkörcentral AB risks to be improper or to prevent, restrict or distort competition and therefore to be incompatible with the general clause in Article 32 (2) fifth subparagraph of the Classical Sector Directive."

81 Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, paras 57–60.
3.5 Proposal to Amend the Swedish Public Procurement Act Highlighting the Duty Not to Restrict Competition, in Particular by Means of Too Large Framework Agreements

Large joint public procurement proceedings may have adverse effects on competition for various reasons. One of these effects has been described in a book by Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell as follows:

"Coordination among buyers can lead to increased concentration on the seller side. … If the public sector is a relatively small actor on the market, this kind of risk related to coordination is probably small. If, however, the public sector is the only buyer or the totally dominant buyer, this is an aspect to take into consideration. Far-reaching coordination can bring short-term benefits for the buyers, but to a price of increased concentration and thus higher prices in the future." 82

The adverse effects of too large framework agreements have been described very well in an opinion written by Företagarna83 as follows:

"Företagarna considers that the design of framework agreements has large consequences as to the possibilities of small undertakings to compete for contracts with the public sector. We have a large, and apparently growing, use of procurement by means of joint framework agreements in Sweden. Procurement by means of joint framework agreements normally involves large contracts with a duration of several years. Of particular importance in this respect is the coordination of purchases among Government authorities. Large joint framework agreements risk making it impossible for small undertakings to participate, because they for obvious reasons often face difficulties to compete if there are requirements concerning large volumes and large geographic coverage. …

Företagarna would like to point out in this regard that it follows from the directive in the classical sector as well as from the travaux préparatoires to LOU that a contracting authority may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. Företagarna considers that an explicit provision in this respect should be added into the Swedish Act on Public Procurement.

The point of departure for Företagarna is that as a rule, every contracting authority should conduct public procurement proceedings on its own. Such separate procurement proceedings are more small-scale, which in turn creates opportunities for reasonable requirements making it possible for small undertakings to participate. Procurement proceedings by way of joint framework agreements should be used very restrictively and only if it is expected to lead to overall better final results for the concerned authorities." 84 (author's translation and emphasis)

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83 The Swedish Federation of Business Owners.
84 Opinion submitted by the organization Företagarna on 27 January 2012 to the Swedish Public Procurement Law Committee, p. 6–7.
In view of the above-mentioned potential adverse effects on competition and the present uncertainty and lack of clarity caused by a lack of proper implementation of Article 32 (2) of the Classical Sector, it is proposed that the Swedish Public Procurement Act is amended, adding a provision stipulating that "contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition". Moreover, it should be considered also to include agreements in general, which would lead to the following extended wording: "Contracting authorities may not use agreements or framework agreements improperly or in such a way as to prevent, restrict or distort competition". In that case, the provisions could be added as a new subparagraph to LOU Chapter 1, Article 9, referring to the classical principles of public procurement law. As to the competition principle embodied in the Classical Sector Directive, this principle will be dealt with in section 4.3 below.

This article focuses on the potential anti-competitive effects of joint framework agreements which may occur under certain circumstances. However, it should be borne in mind that joint framework agreements also have many advantages. Whether a given joint public procurement proceeding in fact is good or bad for competition depends very much on the specific circumstances in each case. This is indeed the overriding conclusion presented by Mats Bergman, Johan Y. Stake and Hans Christian Sundelin Swendsen in an empirical study on joint framework agreements commissioned by the Swedish Competition Authority and published in 2010.\textsuperscript{85}

4. PUBLIC PROCUREMENT PRINCIPLES AND COMPETITION ASPECTS

4.1 Competition Aspects within the Principle of Proportionality

4.1.1 Competition aspects on barriers to entry for newly created undertakings

4.1.1.1 The Recruitment Services Case of 2008 – Göteborg Administrative Court of Appeal\textsuperscript{86}

The City of Helsingborg conducted a public procurement proceeding concerning recruitment services. One of the mandatory requirements was that only undertakings which had performed recruitment services during at least two


\textsuperscript{86} Judgment of the Göteborg Administrative Court of Appeal in Case 1227-08, \textit{Teamwork Bemanning AB v Helsingborg stad}, of 29 September 2008.
completed financial years were allowed to participate in the procurement proceeding. As to this requirement, the Göteborg Administrative Court of Appeal stated:

"Also a newly created company can have hired competent staff holding several years of relevant experience in this area. Hence, the requirement that a tenderer shall have been active during at least two years is not justified and such a requirement can restrict competition, because newly established companies are excluded from the procurement procedure in an improper way." (author's translation and emphasis)

4.1.1.2 The School Transport Case of 2009 – Göteborg Administrative Court of Appeal

The City of Älingås conducted a public procurement proceeding concerning school transports by taxi. One mandatory requirement for tenders to be evaluated was that the tenderer either previously had performed services for the City of Älingås, or that the tenderer could provide references from another customer which had purchased school transports from the tenderer at an extent comparable to the present procurement proceeding. The Göteborg Administrative Court of Appeal stated the following:

"According to the EU law principle of proportionality, a contracting authority may not impose more far-reaching requirements on a supplier than is necessary to fulfill the purpose of a given procurement proceeding. The requirements imposed in a procurement proceeding must therefore have a natural link and be proportionate to what is to be procured. Also the obligation to utilize the highest possible level of competition so that the number of those which can participate in the procurement proceeding is not limited more than necessary has to be taken into consideration." (author's translation and emphasis)

The Göteborg Administrative Court of Appeal considered that also newly started undertakings could dispose of sufficient experience from school transports through their employees and found that the requirement at hand infringed the principle of proportionality.

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87 Page 7 of the judgment.
89 At p. 2–3 of the judgment.
4.1.1.3 The Safety Vest Case of 2012 – Stockholm Administrative Court of Appeal\textsuperscript{90}

In this case the issue under scrutiny was a mandatory requirement that tenderers must have delivered one thousand (1000) safety vests of a certain type at three times prior to the public procurement proceeding at hand to be evaluated as a potential supplier. The Stockholm Administrative Court of Appeal found that such requirements could be set and that it may be both suitable and efficient to do so – but that there had been less interfering ways of ensuring delivery than to demand three previous large deliveries. The Stockholm Administrative Court of Appeal therefore found that the requirement infringed the principle of proportionality.

4.1.2 Competition aspects concerning requirements related to a given object of a procurement proceeding

4.1.2.1 The SIDA Legal Services Case of 2012 – Stockholm Administrative Court\textsuperscript{91}

The Swedish International Development Cooperation Agency (SIDA) conducted a public procurement procedure concerning the provision of legal advice by lawyers. One of the requirements for a tendering law firm to be evaluated was that at least one lawyer per legal area had been member of the Swedish Bar Association for at least ten years. The Stockholm Administrative Court of Appeal found that this requirement was not necessary and therefore infringed the principle of proportionality.

4.1.3 Competition aspects concerning the object of the procurement proceeding itself

4.1.3.1 The Suture Case of 2010 – Supreme Administrative Court\textsuperscript{92}

The County of Jämtland conducted a public procurement proceeding concerning sutures. Johnson & Johnson AB complained to the Jämtland Administrative Court, arguing that the mandatory environmental requirement (that the

\textsuperscript{90} Judgment of the Stockholm Administrative Court of Appeal in Joined Cases 114-12 and 116-12, Rikspolisstyrelsen v Mebler Varion System GmbH and Industris Tissel Job AB, of 23 May 2012.

\textsuperscript{91} Judgment of the Stockholm Administrative Court in Case 22623-11, MAQS Law Firm Advokatbyrå AB v Styrden för internationella utvecklingsarbete (SIDA), of 6 February 2012.

\textsuperscript{92} Judgment of the Supreme Administrative Court in Case 7957-09, RÅ 2010 ref 78, Jämtlands läns landsting v Johnson & Johnson AB, of 18 October 2010.
procured products must not contain triclosan) infringed the principle of proportionality. The Jämtland Administrative Court rejected the complaint. On appeal, the Sundsvall Administrative Appeal Court stated that even though a contracting authority has a far-reaching freedom to freely choose what requirements it wants to impose on tenderers in a public procurement proceeding, all such requirements have to be compatible with the principle of proportionality. The Sundsvall Administrative Court of Appeal concluded that the requirement that the products in question must not contain triclosan infringed the principle of proportionality as the requirement did not constitute a suitable and effective means to fulfil the desired purpose. The County of Jämtland appealed to the Swedish Supreme Administrative Court which stated the following:

“When a contracting authority decides on details related to the object of a public procurement proceeding, it has a high degree of discretion. The contracting authority may, e.g., take environmental considerations by including requirements as to a product’s environmental features in the contract specifications (LOU Chapter 6, Article 3). These requirements must be connected to what is to be procured, i.e. the requirements must relate to and have an influence on the product to be procured. A requirement that a product because of environmental considerations must not contain a certain substance has such a connection. However, the requirements imposed by the contracting authority must not infringe the principles of non-discrimination and freedom of movement for products and services; also in other aspects, the requirements must be in accordance with EU law. The requirement imposed by the contracting authority – that the sutures must be free from triclosan – are formulated in an objective way and do not discriminate against any supplier. Moreover, the requirement does not appear to be arbitrary or obviously subjective. In these circumstances, there is no reason for the Court to examine whether there is any real environmental advantage in avoiding sutures containing triclosan.”

(author’s translation)

In other words, the Swedish Supreme Administrative Court ruled that as the requirement excluding sutures with triclosan for environmental reasons related to the very object of the public procurement proceeding, the contracting authority should enjoy such a high level of discretion that no control of the requirement’s proportionality should be made by courts. Put differently, the principle of proportionality should not apply to the choice of requirements concerning the very object of the public procurement proceeding.

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93 Judgment of the Jämtland Administrative Court in Case 511-09 B, Johnson & Johnson AB v Jämtlands läns landsting, of 24 September 2009.
94 Judgment of the Sundsvall Administrative Court of Appeal in Case 2437-09, Johnson & Johnson AB v Jämtlands läns landsting, of 30 November 2009.
95 Judgment of the Supreme Administrative Court in Case 7957-09, RA 2010 ref 78, Jämtlands läns landsting v Johnson & Johnson AB, of 18 October 2010, p. 3–4.
4.1.3.2 The Invisible Light Case of 2011 – Sundsvall Administrative Court of Appeal

Trafikverket conducted a public procurement proceeding concerning road tax equipment in the Göteborg area. One of the mandatory requirements for a tender to be evaluated was that the offered equipment should use light which is invisible for the human eye. The Falun Administrative Court found that the requirement at hand "distorts competition in a way which infringes the principle of equal treatment prescribed by the Swedish Public Procurement Act" and that the requirement infringes the principle of proportionality as the requirement had not been necessary to achieve the intended purpose. On appeal to the Sundsvall Administrative Court of Appeal, Trafikverket referred to a legal opinion issued by jur.dr. Andrea Sundstrand, according to which Trafikverket was not obliged to accept alternative technical solutions, e.g., such solutions including visible light. The opponent, Kapsch TrafficCom Aktiebolag, referred to a legal opinion issued by professor Ulf Bemitz, according to which the requirement related to invisible light constituted a far-reaching restriction of the possibility for undertakings to compete for the offer. The Sundsvall Administrative Court of Appeal referred to the above-mentioned judgment of the Swedish Supreme Administrative Court in the Suture Case. In line with this precedent, the Sundsvall Administrative Court refrained from examining whether the requirement was compatible with the principle of proportionality, as the requirement concerned the very object of the public procurement proceeding. The Court thus found that the requirement did not infringe the Swedish Public Procurement Act.

4.1.4 Conclusions from case law concerning competition aspects within the principle of proportionality

In its Suture case precedent, the Swedish Supreme Court has ruled that courts should not examine whether a requirement is compatible with the principle of proportionality when the requirement is related to the very object of the public procurement proceeding. In the author's view, this precedent is problematic.

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96 Judgment of the Sundsvall Administrative Court of Appeal in Case 1985-11, Trafikverket v Kapsch TrafficCom Aktiebolag, of 26 October 2011.
97 Judgment of the Falun Administrative Court in Case 1741-11, Kapsch TrafficCom v Trafikverket, of 5 July 2011.
98 Judgment of the Supreme Administrative Court in Case 7957-09, RA 2010 ref 78, Jämtlands läns landsting v Johnson & Johnson AB, of 18 October 2010.
99 Judgment of the Supreme Administrative Court in Case 7957-09, RA 2010 ref 78, Jämtlands läns landsting v Johnson & Johnson AB, of 18 October 2010.
from a competition perspective as anti-competitive effects often relate to the very object of a public procurement proceeding. The consequence of the precedent is, e.g., that the potential anti-competitiveness of requesting sutures not to include triclosan or a road tax equipment not to contain visible light is, de facto, excluded from judicial control. Moreover, the issue whether a certain public procurement proceeding produces anti-competitive effects because of being too large or involving too many different contracting authorities, would equally be outside the scope of judicial control as such features can be said to be related to the very object of a public procurement proceeding. As will be discussed below, this means that competition concerns for the time being are not sufficiently protected by the principle of proportionality.

4.2 Competition Aspects within the Principle of Equality

4.2.1 Competitive advantages for tenderers engaged in an earlier stage of the public procurement proceeding

4.2.1.1 The Fabricom Case of 2005 – CJEU

A Belgian decree concerning public procurement contained the following provision:

"No person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services shall be permitted to apply to participate in or to submit a tender for a contract for those works, supplies or services."

The Belgian Council d’Etat requested a preliminary ruling from the CJEU on the question whether the Belgian provision was compatible with EU law. In its preliminary ruling, the CJEU stated:

"[Provisions of EU law] preclude a rule ... whereby a person who has been instructed to carry out research, experiments, studies or development in connection with a public works, supplies or services contract is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition."

(emphasis added)

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100 Judgment of the Sundsvall Administrative Court of Appeal in Case 1985-11, Trafikverket v Kapshu TrafficCom Aktiebolag, of 26 October 2011.
101 Judgment of the CJEU in Case C-21/03 and C-34/03, Fabricom v Belgium (2005) ECR I-1599.
102 Para. 12 of the judgment.
103 Para. 47 of the judgment.
The CJEU thus ruled that it is contrary to EU law to automatically exclude a person from a public procurement proceeding on the grounds that the person has been engaged in previous research, experiments, studies or development in preparation of the procurement proceeding. Such a person should always be given an opportunity to prove that his earlier engagement did not lead to any experience which is capable of distorting competition, i.e., giving him an unfair competitive advantage.

4.2.2 The Sprinkler Case of 2010\textsuperscript{104} – The Stockholm Administrative Court of Appeal

Uppsala kommunens Fastighetsaktiebolag conducted a public procurement proceeding concerning sprinklers. The contracting authority had hired a company – whose CEO also functioned as CEO for one other company – to assist with establishing of the contract specifications. The other company – in which this person also functioned as CEO – ended up being awarded the public procurement contract. The claimant argued that this arrangement had led to competition being distorted as the winning tenderer had benefitted from obtaining insights into the public procurement proceeding.

The Stockholm Administrative Court of Appeal, as a starting point, stated that contracting authorities must treat tenderers in an equal manner and acknowledge the principles of mutual recognition and proportionality. The Court further argued that there was a strong presumption for a competitive advantage in favour of the winning tenderer due to the double functions of the CEO – which had led to a distortion of competition. This presumption for a competitive advantage meant that the contracting authority had the burden of proof to show that there had been no breach of the principle of equality. The Court found that the public authority had not convincingly shown that the double role of the CEO had not caused advantages for the winning tenderer. The Stockholm Administrative Court of Appeal thus found that the arrangement had infringed the principle of equality.

4.2.3 The Pension Insurance Case of 2011 – Sundsvall Administrative Court of Appeal\textsuperscript{105}

The City of Storuman conducted a public procurement proceeding concerning pension insurance services. The incumbent provider of these services was KPA

\textsuperscript{104} Judgment of the Stockholm Administrative Court of Appeal in Case 6986-09, Braavida Sverige AB v Uppsala kommunen Fastighetsaktiebolag, of 11 February 2010.

\textsuperscript{105} Judgment of the Sundsvall Administrative Court of Appeal in Case 2458-11, Lifoärteköpingaktiebolaget Skandia v Storuman kommun, of 20 December 2011.
Pension Aktiebolag (KPA). Livförsäkringsaktiebolaget Skandia complained, arguing that the contract specifications to a very large extent were based on KPA’s model documents. Skandia had therefore refrained from participating in the public procurement proceeding as it was so much rigged in favour of KPA that the contracting authority would not use the competition on the market and that it was meaningless for Skandia to participate. The Sundsvall Administrative Court of Appeal considered that the contract specifications resembled KPA’s model documents. However, the Court found that Skandia had not proven any harm caused by this resemblance.

4.2.4 Competitive advantage to certain tenderers related to approximative size criteria

4.2.4.1 The Table-top Case of 2009 – Göteborg Administrative Court of Appeal¹⁰⁶

The Cities of Helsingborg and Landskrona conducted a public procurement proceeding concerning furniture. As to the size of tables, there was a mandatory requirement that the length should be approximately 2.40 meter. The tenderer Kinnarps offered a table with a length of 2.00 meter, which was accepted for evaluation by the contracting authorities. Funkab AB complained against this, arguing that Kinnarps’ offer deviated from the mandatory requirement in question and therefore should not have been evaluated by the contracting authorities. The Göteborg Administrative Court of Appeal stated that the length of the table offered by Kinnarps (2.00 m) deviated 17 % from the approximative length requirement of 2.40 m. The Court considered that it would be considerably more expensive to produce a table with a length of 2.40 m compared to a table with the length of 2.00 m. The Göteborg Administrative Court therefore concluded that the contracting authorities had infringed the principle of equality when evaluating the table offered by Kinnarps.

4.2.4.2 The Food Supply Case of 2012 – Göteborg Administrative Court¹⁰⁷

The County of Västra Götaland conducted a public procurement proceeding concerning the supply of food. According to the information provided to the

¹⁰⁶ Judgment of the Göteborg Administrative Court of Appeal in Case 7822–7823-08, Funkab AB v Helsingborgs stad and Landskrona kommun, of 14 April 2009. The author of this article worked at that time as Associate Judge at the Göteborg Administrative Court of Appeal and served as one of three judges giving judgment in this case.

¹⁰⁷ Judgment of the Göteborg Administrative Court in Case 3593-12 E, Martin & Servera AB v Västra Götalands län landsting, of 25 June 2012. The author of this article represented Martin & Servera AB in this case.
tenderers, when approximated figures were used when asking for certain content weight of food packages, a deviation of approximately 15% would be accepted. Martin & Servera AB complained to the Göteborg Administrative Court. The Court found that approximately 15% should be interpreted in such a way that deviations up to 17% were permissible. As some of the products offered by Menigo Foodservice AB deviated between 20 to 50% from the approximative weight requirements, the Göteborg Administrative Court of Appeal found that the contracting parties had infringed the Swedish Public Procurement Act by accepting the products in question.

4.2.5 Conclusions from case law concerning competition aspects within the principle of equality

An infringement of the principle of equality entails a restriction or distortion of competition. This has been formulated by advocate-general Tesauro in the following way:

"Community legislation chiefly concerns economic situations and activities. If, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law, but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market."\(^{108}\) (emphasis added)

However, public procurement proceedings having the effect of restricting or distorting competition will not necessarily entail an infringement of the principle of equality. This has been formulated by Albert Sánchez Graells as follows:

"Consequently, undertakings could be given a clearly anti-competitive treatment in the public procurement arena (or elsewhere) and this would still not result in a discriminatory situation, inasmuch as all the undertakings that were in a similar situation were treated in an equally anti-competitive manner. Obviously, then, in extreme situations the requirements of the principle of equality are insufficient to guarantee respect of the competition principle. It follows that the competition principle has additional requirements that should be integrated and made compatible with the principle of non-discrimination. It is submitted that this means that the competition principle could be understood as a 'regulating device' for the application of the principle of equality - similarly as the proportionality principle does, but with a purposive orientation."\(^{109}\)

\(^{108}\) Opinion of AG Tesauro in Case C-63/89 Assurances du Crédit (at 1829).

The following section will deal with effective competition as the overriding purpose of public procurement and the competition principle embedded in the Classical Sector Directive.

4.3 The Competition Principle and The Purpose of Public Procurement Law

As to the purpose of EU Public Procurement Law, the CJEU has stated:

"It is apparent from the second and tenth recitals in the preamble to Directive 93/37 that coordination seeks the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts and the development, at the Community level, of effective competition in that field, by promoting the widest possible expression of interest among contractors in the Member States" (emphasis added)

The Stockholm Administrative Court of Appeal has in February 2011 stated the following as to the purpose of public procurement law:

"LOU shall be interpreted and applied in accordance with the purpose and wording of the public procurement directives as well as the case law of the CJEU. The main purpose of EU public procurement law is freedom of movement for goods and services and that the area shall be opened for non-distorted competition. Both LOU and the EU directives aim at public procurement proceedings to be conducted by utilizing existing competition in the best way. The provisions aim both at making use of competition in a given public procurement proceeding and developing effective competition.

The purpose of LOU [Chapter 11] Article 11 is to enable contracting authorities to control that the suppliers which have submitted a tender have the capacity to perform, before the tenders are evaluated. In order to meet the main purpose of LOU, to foster competition, the means of proving technical capacity have been limited by making the list of means exhaustive." (author's translation and emphasis)

Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell have summarized the purpose of public procurement law as follows:

"The main idea behind public procurement is thus, put it simply, to let potential suppliers compete in an open, equal and neutral way for public contracts, thereby creating more value for money. ... Hence, it is obvious that the attainment of a competitive situation on the Internal Market which is the rules' overriding aim, but well-functioning competition normally also lead to the contracting authorities being able to get better deals. ... All of the five general EU principles have as their direct or indirect purpose to ensure what can be called effective competition, but

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111 Judgment of the Stockholm Administrative Court of Appeal in Case 6528-10, AB Familjebostäder v Berendten Textil Service AB, on 2 February 2011, p. 4.

(598)
as to the principles of equal treatment, transparency and mutual recognition this is particularly clear. A contracting authority may not limit different undertakings’ possibilities to be considered on equal terms as supplier in relation to public procurement proceedings.”\textsuperscript{112} (author’s translation)

Albert Sánchez Graells has made the following points as to the role of competition in public procurement law:

"Both competition law and public procurement have been the object of a certain instrumentalisation and have sometimes been used to promote 'secondary' policies or goals, eminently of a social or industrial nature. In the case of competition law, these goals have been almost unanimously dropped in recent years and a 'more economic' approach has clearly been embraced (particularly in the EU). In public procurement, the issue of the pursuit of secondary policies is still unsettled – but, in our view, a growing consensus towards minimizing this instrumental use of public procurement is identifiable (and, at any rate, seems the preferable option from a normative perspective). Finally, in the case of the EU, both sets of economic regulation have traditionally been significantly influenced by the goal of market integration – however, given the completion of the internal market process and the relative maturity of the system, the relevance of this goal is fading away in both cases, and is (re-)opening spaces that permit focusing on their 'core' objectives. In view of the substantial commonality of objectives, the protection of competition as a means to maximize economic efficiency and, ultimately, social welfare has been identified as the core common goal of both sets of economic regulation and as the ultimate foundation or aim for the development of a more integrated approach towards competition and public procurement law. Even if it may require a certain adjustability and trade-offs with complementary goals of public procurement (such as the transparency and efficiency of the system), a revision from a competition perspective is consistent with the basic goals and function of public procurement.”\textsuperscript{113}

The following extracts from the recitals to the Classical Sector Directive are of particular interest when analysing the role assigned to competition by the EU legislator in the field of public procurement:

Recital 2 – opening-up of public procurement to competition

"The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable

\textsuperscript{112} Mats Bergman, "Tobias Indén, Sofia Lundberg and Tom Mädel, Offentlig upphandling På rätt sätt och till rätt pris (Lund, Studentlitteratur AB, 2011), p. 15, 41-42 and 50.
to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty." (emphasis added)

Recital 4 — no distortion of competition
"Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers." (emphasis added)

Recital 36 — effective competition
"To ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto." (emphasis added)

The following extracts from Articles of the Classical Sector Directive are of particular interest when analysing the role assigned to competition by the EU legislator in the field of public procurement:

Art 23 (2) — Technical specifications shall not have unjustified adverse effects on competition
"Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition." (emphasis added)

Article 32 (2) — The duty not to restrict competition when using framework agreements
"Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition."

As set out in subsection 3.3.1 above, Article 32 (2) of the Classical Sector Directive imposes a duty on contracting authorities to ensure that their framework agreements do not have anti-competitive effects. If only Article 32 (2) is considered, it may seem reasonable to make an e contrario interpretation, which would lead to the view that contracting authorities are allowed to ignore the effects on competition if they choose to use agreements instead of framework agreements. It is obvious that the anti-competitive effects of a large agreement may be more adverse than those of a very small framework agreement.

An e contrario interpretation could have been justified if the Directive included no other competition obligations as to other aspects of public procure-

ment. However, this is not the case. According to Article 23 (2) of the Directive, contracting authorities are equally obliged to ensure that technical specifications do not result in unjustified anti-competitive effects. Hence, the provision in Article 32 (2) of the Directive does not constitute an exception to the rule, but is consistent with an overall competition principle embedded in the Directive, in particular in the above-mentioned recitals.

Albert Sánchez Graells has written the following on the role of the competition principle embodied in EU Public Procurement law:

"The inquiry has shown – after reviewing current EU legislation and its interpretative case law – how the EU public procurement directives have an embedded competition principle that constitutes a specification and makes direct reference to competition as a general principle of EU law – which serves the fundamental purpose of establishing the fundamental link between EU competition law and EU public procurement law (which are to be seen as complementary sets of regulation that do not hold a special relationship stricte sensu). The competition principles offer the formal legal basis for the introduction and full enforcement of competition considerations in the public procurement setting, but the substance or content of that principles (i.e. its requirements and implications) need to be determined according to the general principles and criteria of EU competition law. In this regard, it has been submitted, that, according to this principle of competition, EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit or distort competition – and contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition." ¹¹⁵ (emphasis in bold added by author)

In an article published in Europarättslig Tidskrift in 2002, Michael Slavicek, the then General Counsel at the Swedish National Board for Public Procurement, argued the following:

"The Swedish Public Procurement Law is often referred to as a complement to competition law. This is not really true. A competitive and well-functioning market is certainly a condition for receiving good tenders. However, contracting authorities shall not create well-functioning competition, but just utilize the competition which exists." ¹¹⁶ (author's translation and emphasis)

This view has for a long time been treated as a truism in the Swedish public procurement community. However, as this article has tried to show, this is not really true anymore. Contracting authorities cannot take competition for granted and just utilize competition at hand. In fact, contracting authorities are


601
not only passive market spectators but active market participants whose actions may significantly affect market conditions and competition.

The competition principle embodied in the Classical Sector Directive imposes an active obligation to ensure that the way they conduct public procurement proceedings is pro-competitive and not anti-competitive. Swedish administrative courts should therefore not treat the Directive's pro-competition provisions as soft law but as hard law, in the sense that infringements of the competition principle should be considered as infringements of the Swedish Public Procurement Act, in the same way as infringements of, e.g. the principles of proportionality and equality.

The Danish Associate Professor in Competition Law, Grith Skovgaard Ølykke, has made the following conclusion in a recent book on the modernisation of public procurement law – which is also very well suited to serve as a conclusion to the present section:

"[W]hen the Commission has finally explicitly acknowledged the importance of undistorted competition between tenderers for the efficiency of public procurement procedures, it is necessary to go all the way and institutionalise competition law assessments in public procurement procedures. This institutionalisation could be through the oversight body or through increasing the role of National Competition Authorities in public procurement procedures; however, it is submitted that the most optimal solution would be to integrate the oversight bodies and the National Competition Authorities."^{117}

5. PUBLIC PROCUREMENT AND COMPETITION LAW APPLICABLE TO ACTIONS BY CONTRACTING AUTHORITIES

5.1 Why is the Control of Buyer Power Exercised by Contracting Authorities an Under-enforced Area of Competition Law

As set out in section 2.1 above, the Swedish Competition Authority has taken a very tough attitude against anti-competitive cooperation between sellers in a public procurement proceeding. Even relatively small undertakings with low market shares do risk considerable fines if caught committing bid-rigging.

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What then, about anti-competitive cooperation between buyers in public procurement proceedings? Swedish contracting authorities procure for approximately 500–600 billion SEK annually, which corresponds to approximately 15.5–18.5 % of Swedish GDP.118 As to certain goods and services, contracting authorities have considerable market shares in the buying market and, hence, often significant market power as buyers.

Therefore, it is interesting to note that, to the author’s knowledge, the Swedish Competition Authority has so far never taken any contracting authorities to court for breach of the competition rules related to joint purchasing by means of joint public procurement proceedings. In contrast, the Swedish Competition Authority has been very active – and successful – in taking contracting authorities to court for breach of the Swedish Public Procurement Act since the Authority was granted this power in July 2010.

The reluctance of the Swedish Competition Authority, as well as other European competition authorities, to apply competition law to public procurement is explained by Albert Sánchez Grijalva as follows:

“From a different perspective, competition policy is an economic policy of ‘offer’, as its main focus is not on consumption, but on the production and offer of goods and services. Hence, competition policy is focused on the market behaviour of producers, or offerors – including intermediaries and economic agents other than consumers. This characteristic of competition policy conditions its scope in a way that passes unnoticed. The object of the present analysis lies only – or mainly – in the offer (i.e., production and distribution) of products and services and the ensuing market power that colluding and dominant firms can exercise. Other aspects of market competition receive relatively less consideration. However, the main focus of competition law should not be termed as the exercise of ‘market’ power, but as the exercise of ‘selling’ power. Such rephrasing automatically sheds light on a relatively unexplored field of competition law: the exercise of ‘buying’ power. This is an omission that is not justified in economic terms, since competition law should treat seller power and buyer power alike. Arguably, then, development of the strands of competition policy is largely conceived of as a set of rules regulating sellers’ competition, whereas demand-side (or buyers’) competition policy remains largely under-developed. The design and development of effective pro-competitive rules to discipline buying power are still incomplete.

Public procurement is at the intersection of the two relatively unexplored fields of competition law, as it relates to the demand-side market behaviour of the public sector. Therefore, it should not be surprising to note that the enforcement of competition law in the public procurement environment has received much less attention than it deserves and, consequently, still remains largely underdeveloped. To be sure, restrictions competition generated by private entities participating in public

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118 Report 2012:3 on “Siffror och fakta om offentlig upphandling” published by the Swedish Competition Authority in 2012, which in turn refers to the report written by Mats Bergman on “Offentlig upphandling och offentliga uppköp – omfattning och sammanfattning” commissioned by the Swedish Competition Authority and published in December 2008.
procurement processes—mainly related to collusion and bid-rigging—have so far attracted most of the attention as regards the intersection of competition law and the public procurement phenomenon."\footnote{119}

In the field of competition law, market power is generally perceived as something bad and an important field of competition policy relates to the combat against (ab)use of market power in an anti-competitive way.

In the field of public procurement, though, contracting authorities' market power is generally perceived as something which can be used for good purposes. One interesting example is LOU Chapter 1, Article 9 a, which stipulates:

"Contracting authorities should take environmental and social considerations into account in connection with public procurements, if the nature of the procurement motivates this."

In the Swedish public debate on public procurement it is generally perceived as something good if the contracting authorities can use their market power as large buyers, to achieve social and environmental progress by imposing more far-reaching obligations on tenderers in this respect than is common on the market in general.\footnote{120}

However, from a competition perspective, use of buyer market power may under certain circumstances be bad also if exercised by public authorities with good intentions. Albert Sánchez Graells has made the following points in this regard:

"[T]he exercise of public buyer power must be limited as much as necessary to avoid its abusive exercise, so that public contracts reflect normal market conditions. The overall conclusion of the detailed analysis of public procurement rules indicate that, in order to promote the development of a more competition-oriented public procurement system, contracting authorities should change perspective (or rather, adopt a more competition-oriented perspective) and take into due consideration the potential effects of their decisions on competition for the contract and in the market concerned, placing special emphasis on not unduly restricting access to the tendering procedure, on not unnecessarily pre-determining the outcome of the tender procedure, and on guaranteeing that the result of the competitive process is not distorted or circumvented post-award, especially as a result of undue renegotiation, amendment, termination or re-tendering of the contract."\footnote{121} (emphasis added)

\footnote{120} For a recent in-depth analysis of buyer power under U.S. competition law, see the article on "Looking at the Monopoly in the Mirror" by Maurice E. Stucke, professor in competition law at the University of Tennessee College of Law, 62 Emory Law Journal (forthcoming 2013).
Another reason for the absence of competition cases as to the actions of contracting authorities in relation to public procurement proceedings may be a wide-spread misunderstanding among market participants that actions by contracting authorities related to public procurement always are exempted from competition law. As will be shown in the next sub-section, this perception is actually wrong. According to settled case law of the CJEU in the FENIN and SELEX cases, competition law may fully apply to actions of contracting authorities in case certain conditions are fulfilled.

5.2 Case Law Currently Exempting Actions by Contracting Authorities from Competition Law Depending on the Subsequent Use Made of the Goods or Services (The FENIN-SELEX Case-law)

In the FENIN case, the General Court in March 2003 stated as follows:

"[I]t is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic ..., not the business of purchasing, as such. Thus, as the Commission has argued, it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.

Consequently, an organisation which purchases goods even in great quantity not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles [101(1) and 102 TFEU]."\(^{122}\)

(emphasis added)

The reasoning of the General Court in this respect was subsequently upheld by the CJEU in its FENIN judgment of 11 July 2006.\(^{123}\)

On 26 March 2009, the CJEU confirmed the view taken in FENIN in its SELEX judgment, where the CJEU stated as follows:

"However, first of all, the Court of First Instance did not err in law when it stated ... referring to the judgment in FENIN v Commission, that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put and that


the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity [...] The Court of First Instance correctly concluded from this that the fact that technical standardisation is not an economic activity means that the acquisition of prototypes in connection with that standardisation is not an economic activity either.\textsuperscript{124}

In a recent judgment given on 12 July 2012 in the Compass case, the CJEU has confirmed the approach taken in the FENIN and SELEX cases.\textsuperscript{125}

5.3 Proposal to Apply Competition Law to All Actions by Contracting Authorities Independently of the Subsequent Use Made of the Goods or Services (Reversal of the FENIN-SELEX Case-law)

According to the FENIN/SELEX case law of the CJEU, competition law is only applicable to purchase activities within public procurement if "the subsequent use of the purchased goods amounts to an economic activity".

Even very large joint purchases, made by contracting authorities having very high market shares on the buying market, are thus currently exempted from EU and consequently also from Swedish competition law, to the extent that the goods and services purchased are to be used exclusively for the exercise of public powers. As Albert Sánchez Graells rightly has concluded in his book on Public Procurement and the EU Competition Rules,\textsuperscript{126} the FENIN – SELEX case law is not well-founded and should be reversed/adopted so that purchases by ways of public procurement fall under the scope of competition law – irrespective of the subsequent use made of the products or services by the contracting authority. If public authorities act on the market as buyers with strong market power the potential anti-competitive effects of joint purchase or other aspects of the public procurement proceeding are the same irrespectively of which use the contracting authorities subsequently choose to make of the goods and services procured.

A significant portion of goods and services purchased by Swedish contracting authorities are subsequently used for economic activity. According to the FENIN/SELEX case law of the CJEU, competition law is clearly applicable to such purchases. However, in view of a lack of enforcement activities from the Swedish Competition Authority in this regard, many contracting authorities

\textsuperscript{124} Judgment of the CJEU in Case C-113/07, P Selex v Commission, of 26 March 2009, paragraph 102.

\textsuperscript{125} Judgment of the CJEU in Case C-138/11, Commerz-Dentenbank GmbH v Republik Österreich, para. 38.

may be unaware of this fact. The Swedish Competition Authority should therefore consider attributing a higher level of priority to this issue. Any investigation initiated by the Swedish Competition Authority in this respect could generate a powerful signal to contracting authorities that competition law should be followed when designing public procurement proceedings.

It is interesting to note that the Swedish Competition Authority until November 2008 in fact had an explicit right to take legal action against any action related to public procurement which in a significant way distorted competition, under the Act on Intervention against Improper Actions Related to Public Procurement. This applied irrespectively of the subsequent use made of the products or services procured by the contracting authority. The Swedish Competition Authority was entitled to file a plaint at the Swedish Market Court, which then could prohibit a specific anti-competitive action by a contracting authority. However, the Swedish Competition Authority very rarely applied the Act on Intervention against Improper Actions Related to Public Procurement and the Act was therefore abolished in 2008.

In the remainder of this article, we will have a brief look at the provisions of competition law governing long term distribution agreements and joint purchasing. These provisions are applicable to long framework agreements and joint procurement as long as the goods and services procured subsequently are used for economic activities and not exclusively for the exercise of public powers.

5.4 Long Term Exclusive Purchase Agreements under Competition Law

If a contracting authority undertakes to exclusively order products or services from a certain framework agreement, the framework agreement can be classified, under competition law, as an exclusive purchase obligation. Such agreements are under competition law considered to be a form of non-compete obligation, which itself is part of the wider group of so called vertical constraints.

Non-compete obligations may infringe Article 101 (1) TFEU (respectively Chapter 2, Article 1 of the Swedish Competition Act). However, according to Article 2 of the Vertical Block Exemption Regulation, most forms of vertical constraints are exempted from the application of Article 101 (1) TFEU, if the market share on the relevant market of both the supplier and the buyer does not exceed 30 %.

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127 Lag (1994:615) om ingripande mot oillämpligt beteende vid upphandling (LIU).
128 For an in-depth analysis of vertical constraints under Swedish and EU law, see Lars Henriksson, *Distributionssavtal – vertikala avtal och konkurrensriktiga aspekter* (Norstedts Juridik, 2012). Exclusive purchase obligations are covered on pages 90 ff.
However, Article 5 (1) of the Vertical Block Exemption Regulation\textsuperscript{129} stipulates an exemption from the exemption as follows:

"The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:
(a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years"

This means that even if the tenderer has a market share of less than 30% of the selling market and the contracting authority has a market share of less than 30% of the buying market, a commitment from the contracting authority to order exclusively from a framework agreement having a validity of more than five years may constitute an infringement of EU and Swedish Competition law. This is explained in the Vertical Guidelines of the Commission as follows:

"The first exclusion is provided for in Article 5(1)(a) of the Block Exemption Regulation and concerns non-compete obligations. Non-compete obligations are arrangements that result in the buyer purchasing from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year (as defined by Article 1(1)(d) of the Block Exemption Regulation), thereby preventing the buyer from purchasing competing goods or services or limiting such purchases to less than 20% of total purchases. ... Such non-compete obligations are not covered by the Block Exemption Regulation where the duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the Block Exemption Regulation (see the second subparagraph of Article 5(1)). In general, non-compete obligations are exempted under that Regulation where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period.\textsuperscript{130}

Even if the exemption is not applicable to a given framework agreement, an individual exemption under Article 101 (3) TFEU may be granted if the supplier has made considerable relationship-specific investments. This is explained in the Commission Vertical Guidelines as follows:

"In the case of a relationship-specific investment made by the supplier ..., a non-compete ... for the period of depreciation of the investment will in general fulfill the conditions of Article 101(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment


\textsuperscript{130} Guidelines on Vertical Restraints, published on 19 May 2010 in the Official Journal of the EU, C 130/1, para. 66.
by the supplier when this equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are normally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans on the premises of or next to the canning facility of a food producer, this new capacity may only be economically viable when producing for this particular customer, in which case the investment would be considered to be relationship-specific.\(^{131}\)

This means on the one hand that a 20 year validity of a framework agreement containing an exclusive purchase obligation may be perfectly compatible with competition law if the supplier is requested to build a relationship-specific facility with a depreciation time of 20 years. On the other hand, a framework agreement including exclusive purchase obligations may infringe competition law even if the validity is shorter than five years, say three years, on the condition that the respective market shares of the supplier and the contracting authorities are above 30%.

Too long framework agreements can thus under EU and Swedish competition law be punished with fines ranging up to 10% of an undertaking’s turnover. However, as set out in section 5.3 above this does not apply to contracting authorities purchasing goods and services exclusively for using them in the exercise of public power and not in economic activities. In such cases (only), procurement is exempted from competition law under the FENIN/SELEX case law of the CJEU.

5.5 Joint Purchasing/Procurement Agreements and Buyers’ Cartels under Competition Law

The Swedish Competition Authority has published the following guidance on its website as to competition law applicable to joint public procurement proceedings: problems related to public procurement:

"Municipalities, counties and Government authorities often cooperate in order to make favourable purchases to the benefit of the Swedish economy and of consumers. Under certain circumstances, such cooperation may restrict or harm competition on the market and infringe competition law related to anti-competitive cooperation. The risk for sellers being obliged to accept unreasonable purchasing requirements increases the more far-reaching the cooperation is. The effect of this is fewer market entrants and that new investments are limited or do not longer occur at all. When municipalities, counties and Government authorities coordinate their pur-

\(^{131}\) Guidelines on Vertical Restraints, published on 19 May 2010 in the Official Journal of the EU, C 130/1, para. 146.
chases, also suppliers may be more interested in cooperation to strengthen their market position. A development towards more concentration among both buyers and sellers can restrict competition resulting in higher prices and lower quality of goods and services. It shall also be borne in mind that cooperation among suppliers increases the risk of spilling over into bid-rigging.\textsuperscript{132}

In its Horizontal Guidelines published in 2011, the European Commission provides guidelines as to how joint purchasing is to be treated under competition law.\textsuperscript{133} The Commission defines joint purchasing as follows:

"Joint purchasing can be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation (collectively referred to as ‘joint purchasing arrangements’). Joint purchasing arrangements usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers. However, buying power may, under certain circumstances, also give rise to competition concerns.\textsuperscript{134}

Whether joint purchasing, respectively joint procurement, is problematic under competition law depends on the combined market shares of the buyers in the buying market as set out by the Commission as follows:

"There is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, in most cases it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15 % on the purchasing market or markets as well as a combined market share not exceeding 15 % on the selling market or markets. In any

\textsuperscript{132} The document "Examples of competition problems related to public procurement proceedings" can be downloaded in Swedish language from the Swedish Competition Authority’s homepage under http://www.kkv.se/ct/Page.aspx?id=387.

\textsuperscript{133} Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines), para. 194–220. As to competition aspects of public procurement, it is interesting to note that the Spanish Competition Authority, the Comisión Nacional de la Competencia, recently has published a Guide on public procurement an competition of approximately 45 pages, it can be downloaded here: http://www.cncompetencia.es/Inicio/Informes/Guia/Recopilaciones/abid/177/Default.aspx. Competition aspects of public procurement have also been covered by two interesting reports commissioned by the Swedish Competition Authority and published on its webpage www.kkv.se: Report 2009:4 on "Effektivare offentlig upphandling – problem och åtgärder ur ett råtekonomiskt perspektiv" written by Eva Edvardsson and Daniel Möius, report 2011:1 on "Omdöd strategisk anbudsgivning i offentlig upphandling" written by Karl Lundvall and Kristian Pedersen. Strategic issues of public procurement are dealt with in a recent book on "Strategisk offentlig upphandling" written by David Beac, Magnus Josephson, Christer Stenqvist and Eva Widding (Jure Förlag AB, 2012).

\textsuperscript{134} Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1, para. 194.
event, if the parties’ combined market shares do not exceed 15% on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled.

A market share above that threshold in one or both markets does not automatically indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition. A joint purchasing arrangement which does not fall within that safe harbour requires a detailed assessment of its effects on the market involving, but not limited to, factors such as market concentration and possible countervailing power of strong suppliers.135

In case joint purchasing respectively joint procurement is anti-competitive, such co-operation may still be exempted and thus be admissible under competition law if the arrangement gives rise to significant efficiency gains as stated by the Commission:

"Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale. Moreover, joint purchasing arrangements may give rise to qualitative efficiency gains by leading suppliers to innovate and introduce new or improved products on the markets.

Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a purchasing agreement do not meet the criteria of Article 101(3). An obligation to purchase exclusively through the co-operation may, in certain cases, be indispensable to achieve the necessary volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case."

As follows from the Horizontal Guidelines, joint procurement is likely to be problematic if the contracting authorities have a combined market share on the buying market exceeding 15% provided that participating contracting authorities are obliged to exclusively place orders from the joint framework agreement. Large contracting authorities, such as for example Sweden’s three largest cities, Stockholm, Göteborg and Malmö, risk having market shares exceeding 15% on the buying market in goods and services particularly targeted to their needs. Therefore, such large contracting authorities should carefully consider the effects on competition before entering into joint procurement agreements with other contracting authorities, as such agreements under certain circumstances may infringe competition law.


According to paragraph 205 of the Horizontal Guidelines, the risk that joint purchasing arrangements restrict competition is particularly high when joint purchasing has the effect of a disguised buyer cartel. Whether a joint procurement proceeding can be characterised as a buyer cartel depends on how it is structured. If tenderers are allowed to submit different tenders for every participating contracting authority, i.e. there is one lot per contracting authority, prices paid by the contracting authorities may vary among them. However, if there is no such division into lots, the effects of the public procurement proceeding will be comparable to those of a price cartel among buyers, as it ensures that none of the participating contracting authorities risk paying more for procured goods and services than other contracting authorities.

Joint purchasing and buyer cartels can under EU and Swedish competition law be punished with fines ranging up to 10% of an undertaking's turnover. However, as set out in section 5.3 above this does not apply to contracting authorities purchasing goods and services exclusively for using them in the exercise of public power as opposed to use for economic activities. In such cases (only), procurement is exempted from competition law under the FENIN/SELEX case law of the CJEU.

5.6 Private Enforcement against Anti-competitive Procurement Agreements Based on Non Time-barred Voidness

Since July 2010, tenderers have the right to initiate legal proceedings before a Swedish administrative court, with a view to declare agreements void when being a result of an illegal direct award. However, according to LOU Chapter 16, Article 17, such action for voidness is time-barred when six months have passed after the agreement was concluded.

Therefore, it may be interesting for tenderers to instead use the voidness provisions provided by the Swedish Competition Act and the TFEU. Agreements which are found to be anti-competitive without any efficiency-based reason for exemption are not only punishable with fines but are also void under Article 101 (3) TFEU and Chapter 2, Article 6 of the Swedish Competition Act. Injunction actions based on voidness resulting from on-going competition law infringements are never time-barred and can be initiated as long as the agreement is still in place.

In this respect, private enforcement of competition law may have an important role to play. However, according to Swedish competition law, tenderers wanting to attack the validity of a procured agreement under competition law may not directly go to court. Instead, they must first file a complaint to the Swedish Competition Authority. Only if the Competition Authority should decide not to pursue the case, a tenderer could then use its so-called subsidiary
right of action and initiate an injunction procedure before the Swedish Market Court.\textsuperscript{137}

Moreover, if a contracting authority or a supplier finds that an agreement infringes competition law they have the possibility to invoke this invalidity as a reason to cease honouring the agreement in question.

Direct agreements between a contracting authority and a supplier are directly void to the extent they infringe competition law. However, as to anti-competitive agreements to initiate joint procurement proceedings, this will not necessarily affect the validity of the agreements subsequently entered into between the individual contracting authorities and suppliers. The question here is whether so called “vertikala följdavtal” – vertical agreements implementing an anti-competitive horizontal agreement – should be deemed to be void because of the overriding horizontal agreement being void. In an article published almost ten years ago in Europarättslig Tidskrift, the author of the present article argued that this should be the case under certain circumstances.\textsuperscript{138}

6. CONCLUSIONS

The main conclusions of this article are as follows:

- The Swedish Public Procurement Act should be amended highlighting the general unlawfulness of joint bids under competition law. Joint bids are only legal under competition law if it would not have been possible for the tenderers to submit independent tenders without help from the other parties to the joint tender.

- The Swedish Public Procurement Act should be amended highlighting the duty not to restrict competition in connection to framework agreements embodied under Art 32 (2) of the Classical Sector Directive. This duty should be transferred from soft law to a hard legal ground for court intervention in case of breach.

- The competition principle embodied in the Classical Sector Directive imposes an active obligation to ensure that the way contracting authorities conduct public procurement proceedings is pro-competitive and not anti-competitive. Swedish administrative courts should therefore not treat the Directive’s pro-competition provisions as soft law but as hard law in the sense that infringements of the competition principle should be considered as

\textsuperscript{137} Chapter 3, Article 2 of the Swedish Competition Act.

\textsuperscript{138} Robert Moldén, ”Förutsättningar för följdavals ogiltighet – en replik” (2003) 2 Europarättslig Tidskrift p. 337 ff. In a more recent article published in the same journal, Elisabeth Eklund deals with this issue, see Elisabeth Eklund, ”Kartellavtal mäste kunna anses konkurrensrättsligt ogiltiga i förhållande till tredje man” (2011) 1 Europarättslig Tidskrift p. 185 ff.
infringements of the Swedish Public Procurement Act in the same way as
infringements of, e.g. the principles of proportionality and equality.

• There is a need for more economic analysis in public procurement litigation,
and consequently, for more economists in this area, both in private practice
and at the Swedish Competition Authority.

• Other Member States should consider following the Swedish example in
voluntarily applying EU law to both competition law and public procure-
ment law under the respective EU thresholds. Such an approach can be
expected to lead to increased competition and more market integration
within the EU.

• In view of considerable synergies, other Member States should consider fol-
lowing the example of Sweden where enforcement of both competition law
and public procurement law has been entrusted to the same authority since
2007, namely the Swedish Competition Authority.

• According to the FENIN/SELEX case law of the CJEU, competition law is
only applicable to purchase activities within public procurement if "the sub-
sequent use of the purchased goods amounts to an economic activity". Even
very large joint purchases, made by contracting authorities having very high
market shares on the buying market, are thus currently exempted from EU
and consequently Swedish competition law – to the extent that the goods
and services purchased are to be used exclusively for the exercise of public
power. As Albert Sánchez Graells rightly has concluded in his book on Public
Procurement and the EU Competition Rules,¹³⁹ the FENIN – SELEX case
law is not well-founded and should be reversed/adopted so that purchases by
ways of public procurement fall under the scope of competition law irre-
respective of the consequent use made of the products or services by the
contracting authority.

• A significant portion of goods and services purchased by Swedish contract-
ing authorities are subsequently used for economic activity. According to the
FENIN/SELEX settled case law of the CJEU, competition law is applicable
to such purchases. However, in view of a lack of enforcement activities from
the Swedish Competition Authority in this regard, many contracting
authorities may be unaware of this fact. The Swedish Competition Authority
should therefore consider attributing a higher level of priority to this issue.
Any investigation initiated by the Swedish Competition Authority in this
respect could generate a powerful signal to contracting authorities that com-
petition law should be followed when designing public procurement pro-
ceedings.

¹³⁹ Albert Sánchez Graells, Public procurement and the EU competition rules (Hart Publishing,
• Private enforcement of competition law may have an important role to play as to anti-competitive agreements entered into by contracting authorities. Whereas voidness actions based on infringements of public procurement law are time-barred when six months have passed after signing of the agreement, injunction actions based on voidness resulting from on-going competition law infringements may be brought during the entire lifetime of a distribution agreement entered into by a contracting authority.
APPENDIX D: FOURTH LICENTIATE ARTICLE
'This is how the Swedish Public Procurement Act should be modified in order to promote fair competition'

(2014) 1 Upphandling 24 p 7 (translated from the original Swedish language version titled ‘Så bör LOU ändras för att främja sund konkurrens’)
LOU borde ändras på flera punkter för att bättre främja sund konkurrens, skriver Robert Moldén, EU-advokat och partner på Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet.

"Så bör LOU ändras för att främja sund konkurrens"

Jag har analyserat svensk och EU-rättspraxis i denna del och funnit att Lagrådet faktiskt hade fel.

Det följer inte alls av likabehandlings- eller proportionalitetsprincipen att en upphandlande myndighet i samband med upphandling av ramavtal skulle ha någon skyldighet att värna konkurrensen på marknaden.

Det är intressant att notera att Konkurrensverket i ett aktuellt yttrande rörande SKL Kommentte närmare del av upphandlingen av kopieringsmaskiner gjort samma bedömning, nämligen att konkurrenskylldheten enligt artikel 32 i det klassiska direktivet inte har implementerats och därför borde ges ett direkt svar via svenska domstolar.

Jag anser därför att det är angiveligt att den svenska lagstiftaren tar tillfället i akt att rätta till Lagrådets felbedömning i denna del i samband med att det nya klassiska upphandlingsdirektivet implementeras i svensk rätt.

Det skulle göra LOU mer konkurrensfrämjande och säkerställer att LOU inte längre bryter mot EU-rätten i detta hänseende.

Det föreslagna lagändringen är dessutom mycket enkel att genomföra. Det enda som krävs är att i LOUs kapitel om ramavtal lägga till följande direktivbestämmelse: "En upphandlande myndighet får inte använda ramavtal på otillbörligt sätt eller på ett sådant sätt att konkurrensen förhindras, begränsas eller snedvrids".

Enkel, det är en mycket enkel lagändring som krävs, skriver Robert Moldén. Ändringen skulle göra LOU mer konkurrensfrämjande.

**Robert Moldén**

EU-advokat och partner på Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet

Robert Moldén har analyserat svensk och EU-rättspraxis i en artikel i Europarådets Tidskrift. För den som vill veta mer finns hela artikeln att läsa på korta.mn/9xug8.
The public procurement act should be modified in some points in order to promote fair competition, writes Robert Moldén, EU-advokat and partner at Gärde Wesslau as well as doctoral candidate in the field of competition- and public procurement law at Lund’s University.

“This is how the Swedish Public Procurement Act should be modified in order to promote fair competition”

Long and very wide framework agreements can have a competition restricting effect, especially when it comes to the chances of small and middle-sized companies to participate in procurements.

Hence, the EU-legislator imposed a requirement in Article 32 of the classic directive so that “the term of a framework agreement may not exceed four years, save in exceptional cases duly justified”. Moreover, “contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition”.

Where do we find these directive provisions in the Swedish Public Procurement Act? As regards to the first requirement, that the term of a framework agreement may not exceed four years, the directive provision is completely implemented and can be found in § 3, Chapter 5 of the Swedish Public Procurement Act. With regard to the second provision, that a framework agreement should not be used in such a way as to restrict competition, for example through very wide framework agreements, one looks in vain into the Swedish Public Procurement Act.
The background to why the directives requirement, that the competition should be protected from framework agreements, is missing in the Swedish Public Procurement Act, is a legal opinion issued by the Swedish Council on Legislation, which found that this requirement already follows from the public procurement principles, such as the principles of equal treatment and proportionality and that it would therefore be unnecessary to implement those provision in the Swedish Public Procurement Act. I have analyzed the Swedish and EU-case law in this part and have found that the Swedish Council on Legislation is wrong.

It doesn’t follow at all from the principles of equal treatment or proportionality that a contracting authority in connection to procurement of framework agreements should have the obligation to preserve competition on the market.

It is interesting to note that the Swedish Competition Authority made the same assessment in a current statement concerning SKL Kommentus Inköpscentral’s procurement for copiers, namely that the competition obligation according to article 32(1) of the classic directive has not been implemented and should therefore be given direct effect by the Swedish courts.

Hence, I think that it is important that the Swedish legislator takes the initiative to correct the Council on Legislation’s misjudgment on this part and at the same time implements the new classic procurement directive into Swedish law.

That gives the Swedish Public Procurement Act a more competition friendly approach and ensure that the Swedish Public Procurement Act does not contravene EU law any longer in this regard. The proposed modification of the law is therefore easy to conduct. It just requires that the following directive provision is added into the Public Procurement Act’s chapter about framework agreements: “A contracting authority may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.”
APPENDIX E:  FIFTH LICENTIATE ARTICLE

'The new classic EU Directive increases competition requirements'

(2014) 2 Upphandling 24 p 8 (translated from the original Swedish language version titled ‘Nytt klassiskt EU-direktiv ökar konkurrenskravet’)
LOU borde ändras på flera punkter för att bättre främja sund konkurrens, skriver Robert Moldén, EU-advokat och delägare i Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet. I förra numret presenterade han förslag på hur LOU borde ändras, här föreslår han ytterligare ändringar.

"Nytt klassiskt EU-direktiv ökar konkurrenskravet"

OMFATANDE RAMAVTALET KAN ha en konkurrensbeväpande effekt, särskilt vad gäller små och medelstora företag och möjligheter att delta i upphandlingar.

Det är intressant att notera att det nya klassiska direktivet som nyigen antogs av EU-parlamentet väsentligen utökar konkurrenskravet. Med det nya direktivet kommer detta krav inte bara att gälla vid upphandling av ramavtal utan vid upphandling av alla kontrakt.

Enligt artikel 18 i det nya direktivet gäller nämligen följande: "Upphållningen får inte utformas i syfte att [...] på ett konstigt sätt begränsa konkurrensen.

Europas ledande expert på relationen mellan konkurrens- och upphandlingsrätt, Albert Sánchez Graells, ansåg att det nya upphandlingsbestämmelsen därmed befattar en nyutvecklad princip inom upphandlingsrätten: konkurrensprincipen.

JAG ÄNNER ATT mycket talar för att han har rätt, läs gärna hans artikel "Principle of competition finally consolidated into public procurement directives" på bloggen How to Crack a Nut (kortanu/u850f).

Jag ansåg däremot att den svenska lagstiftaren bör övervåga att lägga till konkurrensprincipen i LOU på samma sätt som tidigare gjordes i Tyskland, där konkurrensprincipen - "Wettbewerbsprinzip" - redan är upptagen bland de upphandlingsrättsliga principerna i den tyska upphandlingslagen.

För att LOU ska kunna främja sund konkurrens är det viktigt att trasklämnarna för att leverantörer genom överprövning ska kunna agera mot konkurrens- snedvridande upphandlingar inte är för höga.

HÖÖSTA FORVALTNINGSOMSTÖLEN AVKUNNADE den 1 juli 2013 förra året en mycket viktig dom i detta hänseende (HFD 2013 ref. 65). Domen gäller skadekravet vid överprövning av offentlig upphandling. Eftersom klaganden inte klargjort på vilket sätt valet av förfarande hade medfört skada eller risk för skada ansåg HFD att det saknades skillnad att pröva huruvida den upphandlade myndigheten hade haft rätt att välja ett förhandlat förfarande. Tidigare har det i sådana fall – för att uppfylla skaderiskverket - ofta ansetts tillräckligt att visa att det inte går att utesluta att klagandens anbud skulle kunna ha varit ansvariga utformat om bristerna inte funnits.

Det har visat sig att ett betydande antal förvaltningsstrukturer och kammarrätter under den senaste tiden har åberopat HFD-domen för att kräva att klaganden, för att uppfylla skaderiskverket, ska kunna bevisa att denne skulle ha lämnat det vinnande anbudet om de påstådda bristerna inte funnits. I många fall då de påtalade bristerna bygger på att förfrågningsunderlaget har varit otydligt, eller att det förkommeligt omtillåtliga ändringar, så är detta krav i praktiken omöjligt att uppfylla då ingen med säkerhet kan veta hur ett anbud skulle ha utformats i den utgivna situationen som att den påtalade bristerna inte hade föreliggert.

DESSA MYCKET HOERT ställde beviskraven att strida mot EU-rättens effektivitetsprincip samt kraven i det klassiska direktivet på att den leverantör som riskerar skada ska ha rätt till en effektiv överprövning. Dessutom riskerar de höga beviskraven att snedvidra konkurrensen och motverka just sund konkurrens.

Robert Moldén
EU-advokat och delägare i Gärde Wesslau samt doktorand i konkurrens-och upphandlingsrätt vid Lunds universitet

Robert Moldén har analyserat svensk och EU-rättspraxis i en artikel i Europarättslig Tidskrift. För den som vill veta mer finns hela artikeln att läsa på kortanu/9xug8.
The Swedish Public Procurement Act should be modified in some points in order to promote fair competition, writes Robert Moldén, EU-advokat and partner at Gärde Wesslau as well as doctoral candidate in the field of competition and public procurement law at Lund’s University. In a previous edition he presented a proposal as to how the Swedish Public Procurement Act should be modified, in the following article he will propose further modifications.

“The new classic EU Directive increases competition requirements”

Wide framework agreements can have a competition restricting effect, especially when it comes to the chances of small and middle-sized companies to participate in procurements.

It is interesting to note that the new classic Directive, which was recently adopted by the EU Parliament, substantially increases the competition requirements. According to the new directive the requirement will not only apply for the procurement of framework agreements, but for procurements of all contracts. According to Article 18 of the new Directive the following applies: “Procurement may not be designed with the intention […] of artificially narrowing competition”.

Europe’s leading expert on the relation between competition- and public procurement law, Albert Sanchez Graells, thinks that the new procurement directive confirms a newly developed principle within public procurement law: The principle of competition.
In my opinion, there are many indications that he is right, which you can read in his article "Principle of competition finally consolidated into public procurement directive" on the blog How to Crack a Nut (korta.nu/u85of).

I think that the Swedish legislator should consider implementing the competition principal in the Swedish Public Procurement Act as Germany did before, where the principle of competition – “Wettbewerbsprinzip” – is already implemented in the public procurement principles of the German Public Procurement Act.

In order to give the Swedish Public Procurement Act the chance to promote fair competition, is it important that the threshold is not too high, so that contractors have the possibility to act against competition distorting procurement through review.

The Swedish Supreme Administrative Court (HFD) gave an important judgment on this matter on 1 July 2013 (HFD 2013 ref 53). The judgment concerns damage requirements in connection to the review of public procurement. Because the claimant did not clarify in what way the choice of a proceeding had led to damage or risk of damage, there was a reason missing, according to the HFD, to examine whether the contracting authority had the right to choose a negotiated procedure. Previously they held in such a case – in order to fulfill the damage requirements - that it is sufficient to show that it cannot be excluded, that the claimant’s tender could have been different, if the shortcoming would not have been there.

It has been shown that a significant number of administrative courts have followed the HFD lately in order to request that the claimant, in order to fulfill the damage requirements, should be able to prove that he would have left the winning tender, if the alleged shortcoming did not exist. In many cases, where the lodged shortcomings are based on the fact that the tender document was unclear, or that unlawful modifications occurred, this obligation is in practice impossible to fulfill, since no one can know for sure how a
tender would have been framed in the hypothetical situation that the lodged shortcomings did not exist.

The very high burden of proof risks infringing the EU principle of effectiveness as well as the obligation in the classic directive that the contractor, which is risking damage, should have the right to an effective review. Hence, the high burden of proof risks to distort competition and to counteract fair competition.
APPENDIX F: SIXTH LICENTIATE ARTICLE
‘Judgment confirms EU Directive’s competition principle’

(2014) 3 Upphandling 24 p 11 (translated from the original Swedish language version titled ‘Dom bekräftar EU-direktivets konkurrensprincip’)}
"Dom bekräftar EU-direktivets konkurrenspirincip"

LOU borde ändras på flera punkter för att bättre främja sund konkurrens, anser Robert Moldén, EU-advokat. Han gläds över att en dom i Kammarrätten i Göteborg ligger helt i linje med den nya allmänna konkurrenspirincipen som infördes i det nya klassiska direktivet som nylen antogs av EU-parlamentet.

Jag argumenterade i februari- numret av Upplandig 24 för att det nu är dags för den svenska lagstiften att implementera artikel 32 i 2004 års klassiska direktiv om att "upphandlande myndighet får inte använda ramavtal på otillbörligt sätt eller på ett sådant sätt att konkurrenser förhindras, begränsas eller snedvrids". Jag förde även fram att svenska domstolar, i avvaktan på erforderlig ändring av LOU, borde tillämpa direktivets ramavtalsrelaterade konkurrenspirincip direktt med orden: "Otillbörlig och konkurrenssvädrande användning av ramavtal är förbjuden".

Kammarrättens dom ligger helt i linje med den nya allmänna konkurrenspirincipen som infördes i det nya klassiska direktivet som nylen antogs av EU-parlamentet. Enligt artikel 18 i nya direktivet gäller nämligen följande för alla upphandlingar: "Upphandlingen får inte utformas i syfte att [...] på ett konstgjort sätt begränsa konkurrensen".

Jag argumenterade i februari- numret av Upplandig 24 för att det nu är dags för den svenska lagstiften att implementera artikel 32 i 2004 års klassiska direktiv om att "upphandlande myndighet får inte använda ramavtal på otillbörligt sätt eller på ett sådant sätt att konkurrenser förhindras, begränsas eller snedvrids". Jag förde även fram att svenska domstolar, i avvaktan på erforderlig ändring av LOU, borde tillämpa direktivets ramavtalsrelaterade konkurrenspirincip genom att ge artikel 32 i direktivet direktt.

Jag har i flera debattartiklar pekat på några av slutsatserna från min lisenatvitavhållning om relationen mellan konkurrens- och upphandlingsrätt som jag avser att lägga fram vid Lunds universitet senare i år.

Avhandlingen innehåller en lång rad konkreta förslag på hur LOU kan göras mer konkurrenframjande och jag vill ta upp ett mycket konkret förslag på hur LOU bör ändras för att göra den mer konkurrensfrämjande.

OM MAN SOM FÖRETAGARE BLIR TILLFRÅGADE AV ETT ANNAT FÖRETAG OM ATT LÄMNA ETT GENOMSNITT ANBUD I EN OFFENTLIG UPPHANGLING LIGGER DET NÄRA ATT FRÅGA SIG OM DET ÄR LAGLIGT ELLER INTE.

Den företagare som siker sig till LOU kapitel I, paragraf 11, får ett väldigt tydligt och positivt svar: "Grupper av leverantörer har rätt att anmäla om att få lämna ett anbud och att lämna ett anbud".

Problemets åt ett sådant gemensamt anbud, även om det är helt föreligt med LOU, samtidigt kan utgöra en mycket allvarlig överträdelse av konkurrensreglerna och ge höga böter för att skapa en anbudsavbrott om företagarna hade kunnat lämnas anbud var för sig, se Konurrensevrokets interaktive vägledning på korta.nu/lar4.

JAG FÖRESLAR DÄRFÖR ATT DET I LOU INFÖRS EN UPPLYSNING OM ATT GENOMSÄTTE ANBUDSFRÅGOR.

Robert Moldén
EU-advokat och delägare i Göteborgs advokatbyrå Westin Advokatbyrå och Robert Moldén AB, delägare i Konurrensevrokets etablerade med verksamhet i immigrationsfrågor.

Debattera på Upplandig


Judgment confirms
EU Directive’s competition principle

The Swedish Public Procurement Act should be modified in some points in order to promote fair competition, says Robert Molden, EU-advokat. He is delighted that a judgment of the Göteborg Administrative Court of Appeal is completely in line with the new general competition principle that was implemented in the new classic Directive which was recently adopted by the EU Parliament.

**Long and very large framework agreements can have a competition restricting effect, especially when it comes to the chances of small and middle-sized companies to participate in procurements.**

As a doctoral candidate specialized on relations between competition and public procurement, it is therefore delighting to note that the Göteborg Administrative Court of Appeal issued an important judgment on 14 March 2014 in which the court confirms the Directive’s framework related competition principle direct effect by writing: “The unacceptable and competition distorting use of a framework agreement is prohibited”.

The judgment of the Göteborg Administrative Court of Appeal is completely in line with the new general competition principal which was implemented in the new classic Directive that was recently adopted by the EU Parliament. According to Article 18 of the new Directive, the following applies for all procurements: “A procurement may not be designed with the intention […] of artificially narrowing competition.”
I reasoned in the February edition of Uphandling 24 that it is now time for the Swedish legislator to implement Article 32(1) of the 2004 classic Directive so that: “Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition”. I continued that Swedish courts, pending the necessary modification in the Swedish Competition Act, should apply the Directive’s framework related competition principle by giving Article 32 of the Directive direct effect.

In several articles, I have pointed out some of the conclusions from my doctoral dissertation about the relations between competition- and public procurement law, which I intend to submit at Lund’s University later this year. My dissertation contains a number of concrete proposals as to how the Swedish Competition Act can get more competition friendly and I want to take up a concrete proposal as to how the Swedish Competition Act should be modified in order to be more competition friendly.

If a company gets asked by another company whether to hand in a joint tender for a public procurement, it will of course question whether that is legal or not.

The company that has a look into paragraph 11, Chapter 1 of the Swedish Public Procurement Act will get a very distinct and positive answer: “Groups of suppliers are entitled to apply to be allowed to submit a tender and to submit a tender.”

The problem is that such a joint tender, even if it is completely in line with the Swedish Public Procurement Act, can at the same time infringe competition rules and cause high fines as an unlawful bid-rigging cartels if the companies would have been able to hand in the tender separately, see the Swedish Competition Authority’s interactive guidelines at korta.nu/lar41.
I therefore suggest that a reference should be inserted into the Swedish Public Procurement Act which states that a joint tender can infringe Swedish and EU competition rules.

That should be a smooth and cost efficient way to make the Swedish Public Procurement Act more competition friendly.
APPENDIX G: SEVENTH LICENTIATE ARTICLE
‘That’s how the competition principle should be implemented in the new Swedish Public Procurement Act’

(2015) 1 Upphandling 24 p 13 (translated from the original Swedish language version titled ‘Så bör konkurrensprincipen införas i nya LOU’)
"Så bör konkurrensprinципen införas i nya LOU"


Det nya klassiska direktivet som antogs av EU-parlamentet i januari 2014 innebär en märkbart skärping av konkurrensskretet inom offentlig upphandling.

Enligt artikel 18 i nya direktivet gäller nämligen följande: "Uphandlingen får inte utföras i syfte att [...] på ett konstigt sätt begränsa konkurrensprenципen". Denna nya allmänna konkurrensprinцип kommer inte bara att gälla vid upphandling av ramavtal utan vid all upphandling.

Genomförandeutredningen föreslår att den nya allmänna konkurrensprinципen förs in fullt ut i nya LOU med följande lydelse: "En upphandling får inte utföras i syfte [...] att begränsa konkurrensprenципen så att dessa leverantörernas gynnsamma eller missgynnsamma på ett otillbörligt sätt". Utredningens förlag ligger altså helt i linje med det direktivet i denna del.

Långt och mycket omfattande ramavtal kan ha en konkurrensbegränsande effekt, sådant vad gäller små och medelstora företagens möjligheter att delta i upphandlinger.

Därfor har jag i tidigare nummer av Upphandling 24 samt i en omfattande artikel i Europarättsliga Tidsskrift argumenterat för att det nu är dags för den svenska lagstiftaren att implementera artikel 32 i 2004 års klassiska direktiv om att "en upphandlande myndighet får inte använda ramavtal på otillbörligt sätt eller på ett sådant sätt att konkurrensprenципen förhindras, begränsas eller snedvrids.

MOT DENNA RÅKORUNDA är det därför mycket nedsäende att Genomförandeutredningen inte har tagit tillfället iakt att föra in den ramavtalsrelaterade konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU. En anledning kan vara att det inte finns tillfredsställande konkurrensprinципen i LOU.


Robert Moldén
EU-advokat och docent i Goteborgs universitet och doktorand i konkurrens- och upphandlingsrätt.

Robert Moldén har analyserat EU:s upphandlingsristliga konkurrensprinципer i en artikel i Europarättsliga Tidsskrift. Den finns att läsa på kortes.nu/7a6298

Upphandling 24 · Nummer 1 · 2016
“That’s how the competition principle should be implemented in the new Swedish Public Procurement Act”

The implementation commission’s proposal concerning the new competition principle does not go far enough, writes Robert Molden, EU-advokat. He analyzed the new competition principle in three articles, which were published during spring 2014. In this article, he will present a proposal as to how the new competition principle should be implemented into the new Swedish Public Procurement Act in order to be compatible with EU Law.

The new classic Directive, which was issued by the EU parliament in January 2014, contains a noticeable tightening of the competition requirement within public procurement.

According to Article 18 in the new directive the following applies: “The design of the procurement shall not be made with the intention [...] of artificially narrowing competition.” This new competition principle will not only apply in connection to the procurement of framework agreements, but for every procurement.

The implementation commission suggested that the new general competition principal is implemented completely in the new Public Procurement Act as follows: “A procurement may not be designed in order [...] to restrict competition so that some contractors benefit or suffer unduly.” So the proposal of the commission is completely in line with the Directive in this part.
Long and very large framework agreements can have a competition restricting effect, especially when it comes to the chances of small and middle-sized companies to participate in procurements. Hence, I reasoned in an earlier issue of Upphandling 24, as well as in an comprehensive article in Europarättslig tidskrift, that it is now time for the Swedish legislator to implement Article 32(1) of the 2004 classic directive so that “Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.”

Against this background, it is therefore very disappointing that the implementation commission did not take the initiative to implement the framework agreement related competition principle in the Swedish Public Procurement Act. One reason could be that the framework related competition principal has been moved from the articles to the preamble. Point 61 in the preamble of the 2014 Directive has basically the same wording as Article 32(1) of the 2004 Directive: “Framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition.”

My understanding is that the provision in question moved from the articles to the preamble of the directive in order to shorten down the amount of articles. It was however not the EU legislator’s intention to repeal the framework agreement related competition principle. I agree in this part with Professor Sue Arrowsmiths’ views, which she presents in the new edition of her leading book “The law of Public and Utilities Procurement” (p. 1178), that the Court of Justice of the EU is going to apply the framework agreement related competition principal in the same way as before, even if it was moved from the articles to the preamble of the 2014 public procurement directive. That implicates that the implementation commission’s suggestion does not go far enough as to the framework agreement related competition principle and supposedly infringes EU Law. It is therefore time for the legislator to take a new initiative in order to fully implement the EU competition principle into Swedish public procurement law.
APPENDIX H: EIGHTH LICENTIATE ARTICLE
‘Better Competition with Direct Effect’

Published on the Swedish on-line public procurement journal Inköpsrådet on 11 May 2016, (translated from the original Swedish language version titled ‘Bättre konkurrens med direkt effekt’, www.inkopsradet.se)
Bättre konkurrens med direkt effekt

2016-05-11  Konkurrens, Lagstiftning, Upphandling  Robert Moldén

De nya upphandlingsdirektiven gör det enklare för mindre och nystartade företag att delta i upphandlingar. Robert Moldén redar ut begreppen kring direkt effekt, skärpta omsättningskrav och den nya konkurrensprincipen.

Ett av huvudsyftena med de nya upphandlingsdirektiven är att främja konkurrensen genom att göra det lättare för små- och medelstora företag att delta i offentliga upphandlingar. Detta kommer att bli tydligt när den nya lagen om offentlig upphandling väl träder i kraft i början av nästa år med drygt åtta månaders försening efter att sista implementeringsdatumet passerades i april.

Bestämmelser med direkt effekt

Vid ett välbesökt frukostseminarium presenterade Upphandlingsmyndigheten nyligen sina rekommendationer rörande vilka av direktivens bestämmelser som sannolikt har direkt effekt och som därför bör tillämpas av upphandlande myndigheter redan nu innan nya LOU träder i kraft. Läs mer på: Nyheterna i den kommande lagstiftningen och hur hanterar vi mellantiden.

Det är intressant att notera att Upphandlingsmyndigheten bedömer att flera av direktivens konkurrensfrämjande bestämmelser tillhör dem som har direkt effekt.

Gynnar seriösa företag

En viktig konkurrensfrämjande bestämmelse som sannolikt har direkt effekt, och därmed ska tillämpas av upphandlande myndigheter redan nu, är att omsättningskravet för att få delta i en offentlig upphandling inte får vara mer än

http://inkopsradet.se/expert/battre-konkurrens-med-direkt-effekt/?utm_source=nyhets...  2016-05-28
dubbelt så högt som kontraktsvärdet. Detta kommer att göra det betydligt
enkare för många små och nystartade företag att delta i upphandlingar. Det finns
even flera direktivbestämmelser med direkt effekt som kommer att gynna alla
typer av seriösa företag. Till exempel får seriösa företag rätt att i vissa situationer
driva igenom att upphandlande myndigheter ingriper mot mindre seriösa företags
onormalt låga anbud, vilket hittills har varit frivilligt för myndigheterna att göra.

**Den nya konkurrensprinципen**
En annan nyhet i direktiven som jag anser kan få stor praktisk betydelse för
wälskött företag är **den nya konkurrensprinципen** som innebär att en
upphandling inte får utformas i syfte att begränsa konkurrensten så att vissa
leverantörer gynnas eller missgynnas på ett otillbörligt sätt. Europas ledande
expert på konkurrensfrågor kopplade till offentlig upphandling, Albert Sánchez
Graells, vid Bristols universitet, talade nyligen om detta på Upphandlingsdagarna
och har gjort en sammanfattning på sin engelskspråkiga blogg. Läs mer här: Some
thoughts on the principle of competition's direct and indirect effects in public
procurement from 18 April 2016..

Dessa frågor kommer även att belysas under Västsvenska Handelskammarens
upphandlingsdag den 25 maj i Göteborg vid ett seminarium om
Konkurrensprinципen och onormalt låga anbud tillsammans med Fredrik Rogö
från Göteborgs upphandlingsbolag.

Bättre konkurrens direkt tack vare direkt effekt, alltså!

Robert Moldén
Better Competition with Direct Effect

The new public procurement directives make it easier for small and newly established companies to participate in public procurement proceedings. Robert Moldén analyses the issues of direct effect, new turnover requirements and the new competition principle.

One of the main purposes of the new public procurement directives is to enhance competition by making it easier for small and middle-sized companies to participate in public procurement proceedings. This will become evident when the new Swedish Public Procurement Act enters into force in the beginning of 2017 with a delay of eight months after the implementation deadline passed by in April 2016.

Provisions with direct effect

At a well-attended breakfast seminar, the Swedish National Agency for Public Procurement recently presented its recommendations as to which of the Directives’ provisions probably have direct effect and therefore should be applied by contracting authorities already now before the new Swedish Public Procurement Act enters into force.

It is interesting to note that the Swedish National Agency for Public Procurement considers that several of the pro-competitive provisions of the new Directives have direct effect.

Favours serious companies

An important pro-competitive provision that probably has direct effect, and therefore has to be applied by contracting authorities already now, is that the turnover requirement for participating in a public procurement proceeding may not exceed twice the contract value. This should make it considerably easier for many small and newly established companies to participate in public procurement proceedings. There are several of the Directives’ provisions with direct effect which will benefit all types of serious companies. For example, serious companies are, under certain circumstances, entitled to request that contracting authorities take action against abnormally low tenders given by less serious companies, which before has not been mandatory for contracting authorities to do.
The new competition principle

Another novelty in the new Directives, which I think will have significant practical impacts for well-run companies is the new competition principle, according to which a public procurement proceeding may not be designed in order to restrict competition so that some contractors benefit or suffer unduly. Europe’s leading expert on competition issues related to public procurement, Albert Sánchez Graells from the University of Bristol, recently talked about this issue at the Swedish public procurement conference Upphandlingsdagarna and has provided a summary on his English language blog How to Crack a Nut in an article titled: “Some thoughts on the principle of competition’s direct and indirect effects in public procurement from 18 April 2016”.

These issues will also be discussed at the Swedish public procurement conference Västsvenska Handelskammarens upphandlingsdag on 25 May 2016 in Gothenburg at a seminar on The Competition Principle and Abnormally Low Tenders together with Fredrik Rogö from the City of Gothenburg’s Procurement Company.

More competition thanks to direct effect is thus the message!

Robert Moldén
APPENDIX I: SCHEMATIC OVERVIEW OF THE LICENTIATE THESIS

COMPETITION AND PUBLIC PROCUREMENT

- With Special Focus on Pro-competitive and Anti-competitive Information Exchange as well as the New Competition Principle of the New EU Public Procurement Directives

INFORMATION EXCHANGE IN GENERAL

INFORMATION EXCHANGE INITIATED BY COMPANIES THEMSELVES

Outside the scope of the thesis

INFORMATION EXCHANGE RELATED TO PUBLIC PROCUREMENT

Information exchange and bid-rigging cartels
For conclusions, see section 3.4

Protection of sensitive information in public procurement proceedings
For conclusions, see section 3.5

THE ROLE OF COMPETITION IN PUBLIC PROCUREMENT LAW
For conclusions, see section 3.3

INFORMATION EXCHANGE OTHERWISE INITIATED BY PUBLIC AUTHORITIES

Mandatory supply of interoperability information
For conclusions, see section 3.1

Exchange of information between competition authorities and courts
For conclusions, see section 3.2