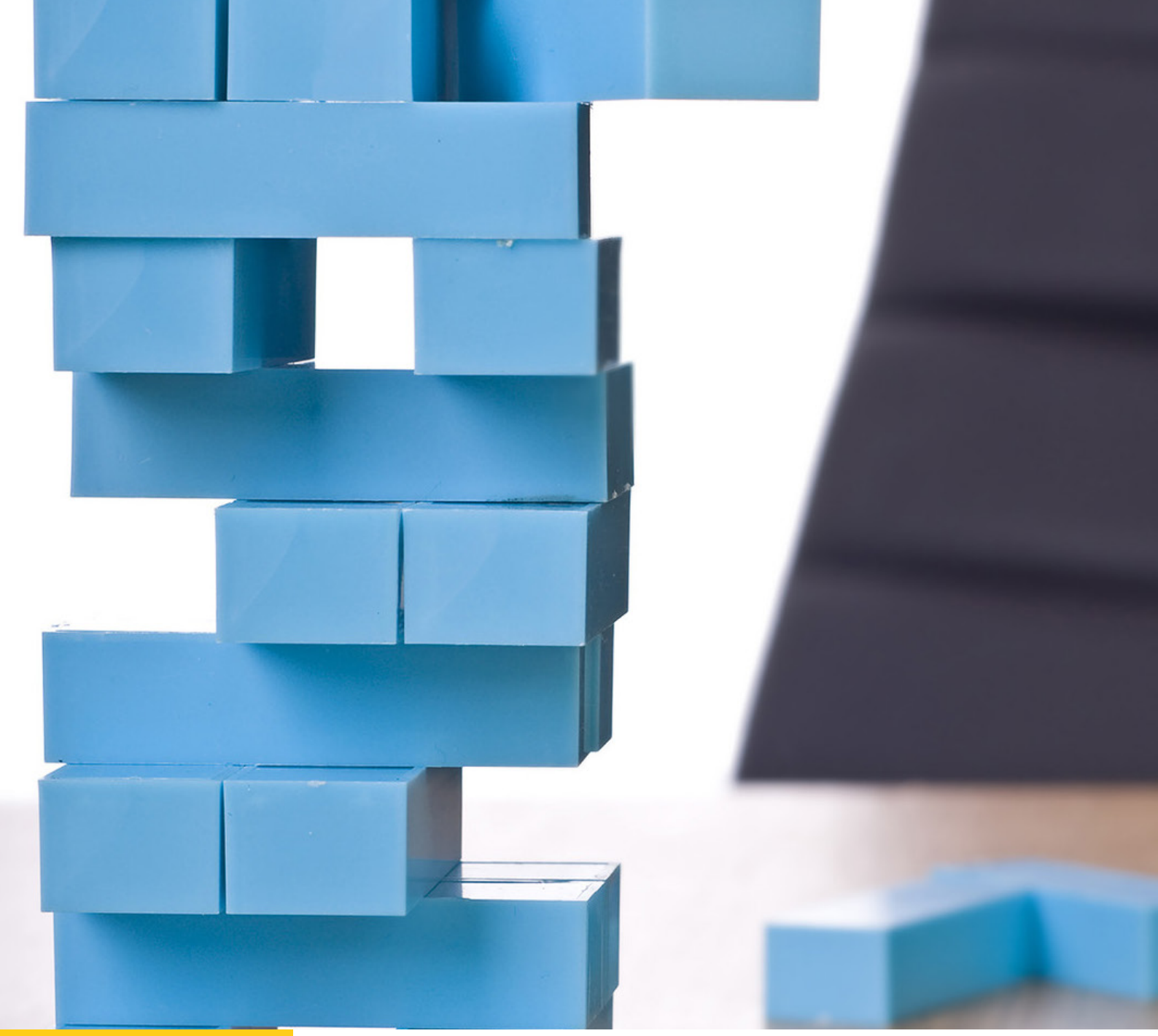

Characteristics of Separate Operational Units
– A Study on Aggregation Rules under Public Procurement Law

Av Kirsi-Maria Halonen på uppdrag av Konkurrensverket

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Preface

I Konkurrensverkets uppdrag ingår att främja forskning på konkurrens- och upphandlingsområdet.

Konkurrensverket har gett jur.dr Kirsi-Maria Halonen vid University of Lapland i uppdrag att, inom ramen för Konkurrensverkets uppdragsforskning, utreda vad som utgör en upphandlande myndighet och/eller en separat operativ enhet.

Frågan är relevant i flera hänseenden. För det första är det av betydelse för beräkningen av ett kontrakts värde med hänsyn tagen till regeln om sammanräkning av kontrakt av samma slag. Kontraktsvärdet är en viktig omständighet för att veta om och i så fall hur en upphandling ska annonseras. Frågan har också betydelse för Konkurrensverkets ansökningar om upphandlingsskadeavgift. Vid fastställande av upphandlingsskadeavgiftens storlek ska särskild hänsyn tas till hur allvarlig den aktuella överträdelsen är. Att en upphandlande myndighet har begått upprepade överträdelser bestående i otillåtna direktupphandlingar kan anses som en försvårande omständighet. Det är därför viktigt att veta om en upphandlade myndighet ska läggas en tidigare överträdelse till last med högre avgift som följd.

Författaren av denna rapport pekar på att det är svårt att ge entydiga svar på vad som är en separat operativ enhet. En enskild enhets status kan variera beroende på kontraktets typ och värde vilket gör att det krävs en analys i varje enskilt fall. Författaren har utifrån detta skäl presenterat en praktisk checklista i syfte att underlätta utvärderingen av en enhets status.

Till projektet har knutits en referensgrupp bestående av Gustav Swedlund (Stockholms stad) samt Niklaz Kling (Upphandlingsmyndigheten). Från Konkurrensverket har Selma Becirbegovic, Andreas Kanellopoulos, Joel Lack, Malin de Jounge samt Joakim Wallenklint deltagit.

Författaren ansvarar själv för alla slutsatser och bedömningar i rapporten.

Stockholm, februari 2017

Karin Lunning
Tf. generaldirektör

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Sammanfattning

EU:s och svenska nationella regler om offentlig upphandling anger bland annat att centrala och lokala myndigheter kan vara upphandlande myndigheter. Dessutom ska reglerna om offentlig upphandling tillämpas på "offentligrättsliga organ". Dessa organ omfattar statligt och kommunalt ägda enheter om deras verksamhet är av allmänt intresse och inte har kommersiell eller industriell karaktär.

Den 30 november 2016 antog Sveriges riksdag de nya reglerna om offentlig upphandling, *lagen (2016:1145) om offentlig upphandling* ("LOU") då man implementerade direktivet 2014/24. Den nya lagen om offentlig upphandling trädde i kraft i januari 2017. Innan man införde de nya lagarna, fanns inte begreppet separata operativa enheter i den svenska lagstiftningen. Genom artikel 5(2) i det nya upphandlingsdirektivet 2014/24 har begreppet "separat operativ enhet" introducerats inom upphandlingsrätten. Denna bestämmelse anger regler för beräkning av kontraktsvärde i det fall när en upphandlande myndighet består av ett antal separata operativa enheter. I artikel 5(2) anges följande:

> "Om en upphandlande myndighet består av ett flertal separata operativa enheter ska det uppskattade totala värdet för alla enskilda operativa enheter beaktas.
>
> Trots vad som sägs i första stycket får värdena uppskattas för den berörda enheten om en separat operativ enhet självständigt ansvarar för sin upphandling eller vissa kategorier av denna."

Det betyder alltså att sammanläggningskravet för inköp som görs för separata operativa enheter beror på om enheterna är tillräckligt självständiga. I skälen till det nya upphandlingsdirektivet anges flera exempel på omständigheter som kan tas i beaktande vid bedömning av en enhets självständighet. Således kan en enhet antas vara självständig ifall den självständigt genomför upphandlingar och beslutar om inköp, förfogar över en egen budgetpost för de berörda upphandlingarna, ingår kontraktet självständigt och finansierar det ur en budget som den förfogar över.

Bakgrund

Bakgrunden till reglerna om separata operativa enheter diskuteras inte i direktiv 2014/24. Reglerna fanns heller inte med i kommissionens utkast till ett nytt upphandlingsdirektiv som publicerades 2011. Trots detta var frågan inte okänd inom det upphandlingsrättsliga fältet i EU. Redan för mer än tjugo år sen, i januari 1993, publicerade EU-kommissionen riktlinjerna "Contracts Awarded by Separate Units of a Contracting Entity under Dir. 90/531/EEC (Utilities)"för kontrakt som tilldelats separata enheter inom försörjningssektorerna.

Ett av skälen för att publicera sådana riktlinjer står troligtvis att finna i Storbritannien där begreppet "discrete operational unit" använts sedan början av

1990-talet. I brittisk lagstiftning tjänade detta som ett undantag till den allmänna regeln om att värdet av kontrakt skulle läggas samman för att bedöma om det relevanta tröskelvärdet överskreds eller inte. Några tydliga lagregler om vilka slags enheter som kunde omfattas av undantaget fanns emellertid inte i brittisk rätt. Dock ansågs skolor som fick lokalt understöd omfattas av undantaget.

Vad är en upphandlande myndighet?

Utöver begreppet separata operativa enheter är även betydelsen av ”upphandlande myndighet” av vikt vid bedömning av om värdet av olika inköp ska läggas samman. På grund av tvetydigheterna i definitionen av ”upphandlande myndighet” har svenska myndigheter använt sig av olika tolkningar. Exempelvis har vissa större kommuner ansett att olika förvaltningar eller andra enheter, som skolor, ska ses som självständiga delar i förhållande till kommunen i övrigt och därför även som egna upphandlande myndigheter. Dessa skulle därmed inte tvingas lägga samman sina inköp med inköp som görs av andra delar av samma kommun för att fastställa av kontraktsvärde. Innan antagandet av det nya upphandlingsdirektivet 2014/24 fanns inget direkt stöd för en sådan tolkning i reglerna om offentlig upphandling inom den klassiska sektorn.

Syftet med sammanläggningsreglerna är att undvika att kontrakts delas upp och att upphandlande myndigheter vidtar andra åtgärder för att kringgå EU:s regler om offentlig upphandling. Som professor Sue Arrowsmith har påpekat är avsiktlig kontraktsuppdelning svår att bevisa. Genom sammanläggningsreglerna försvinner emellertid behovet av att bevisa uppsåt. Dessutom bidrar sammanläggnings-reglerna till direktivens effektivitet och bredare tillämplighet, eftersom tröskel-värdena därigenom överskrids oftare än i fall där värdet hade baserats på ett enskilt inköp.[1] Undantag från huvudregeln om att sammanläggning av inköp av samma varor, tjänster och byggentreprenadet ska göras inom en och samma upphandlande myndighet kan endast ges på objektiva grunder. Det åligger den separata operativa enheten och den upphandlande myndigheten att påvisa förekomsten av sådana grunder och lägga fram bevis för dessa.

Enligt artikel 5 i direktiv 2014/24 har metoden för beräkning av kontraktsvärde sin grund i ett visst kontrakt eller en viss tidsperiod. Direktivet tar emellertid inte upp frågan om vad som ska anses utgöra en och samma upphandlande myndighet i förhållande till sammanläggningsreglerna. Följden av att direktivtexten ger liten eller ingen vägledning för frågan om vad som utgör en upphandlande myndighet är att tolkningen av begreppet varierar mellan olika medlemsstater. Det är därför oklart om definitionen av ”upphandlande myndighet” kräver att myndigheten också är en separat juridisk person eller om varje offentlig myndighet som verkar inom ramen för statens, landstingets eller kommunens juridiska person också är en egen upphandlande myndighet Det verkar som att den allmänna synen i de länder

[1] Arrowsmith 2014, s. 462–463.

som omfattas av denna studie är att inköp gjorda av statliga myndigheter inte ska läggas samman. I vissa länder anses olika statliga myndigheter vara olika upphandlande myndigheter, medan andra länder ser statliga myndigheter som separata operativa enheter inom staten.

EU-rätten tar inte ställning till frågan om en avdelning eller institution som inte är en enskild juridisk person kan ses som en upphandlande myndighet. Studien visar att fördelning av makt och sammanläggningsregler för olika enheter ofta har setts som frågor för den nationella rätten. På kommunal nivå är tolkningarna dessutom skiftande mellan olika medlemsstater. Det verkar som att man, inom svensk förvaltningsrätt, ser varje kommunal nämnd som en egen offentlig myndighet. Enligt LOU är sådana kommunala myndigheter också upphandlande myndigheter. Alltså skulle en kommun eller ett landsting kunna bestå av flera upphandlande myndigheter. Även i Frankrike och Spanien kan kommuner bestå av olika upphandlande myndigheter vars inköp inte måste läggas samman. Å andra sidan ses en kommun i Tyskland som en enda upphandlande myndighet. Detta beror på att tyska upphandlingsregler kopplar definitionen av ”upphandlande myndighet” till unika juridiska personer.

Separata operativa enheter är inte självständiga upphandlande myndigheter

Inom svensk juridisk litteratur har definitionerna av ”upphandlande myndighet” och ”separata operativa enhet” ofta missförstått såsom synonymer. Enligt denna syn skulle separata operativa enheterna alltså samtidigt också vara separata upphandlande myndigheter. Denna inställning tycks vara oförenlig, inte bara med EU-kommissionens syn, utan även med den uppfattning som presenterades av den svenska lagstiftaren i förslaget till ny upphandlingslagstiftning (prop. 2015/16:195). Enligt kommissionens ovan nämnda policyriktlinjer är de separata operativa enheterna delar av en upphandlande enhet, inte upphandlande enheter i och för sig. Detta framgår även av artikel 5(2) i direktiv 2014/24, enligt vilken enheterna inte är upphandlande myndigheter, utan snarare delar av en sådan.

Att det rör sig om två olika slags rättsbegrepp tycks dessutom följa av en systematisk läsning av lagreglerna. Det är således viktigt att särskilja dessa två begrepp: sammanläggningsregler och begreppet separat operativ enhet tillämpas inom en och samma upphandlande myndighet, men inte mellan olika upphandlande myndigheter om inte upphandlande myndigheter har valt att utföra en gemensam upphandling av samma behov.

Checklista för bedömning av separata operativa enheters självständighet

Inköp av självständiga enheter ska som huvudregel läggas samman. Inte desto mindre kan kontraktsvärdet, av objektiva skäl, beräknas på den enskilda enhetens. Denna studie beskriver flera aspekter som kan tas i beaktande vid bedömning av en enhets självständighet. Utifrån dessa element kan en icke-uttömmande och indikativ checklista skapas, i syfte att underlätta bedömningen av en enhets status. I denna studie har det inte getts några otvetydiga exempel på separata operativa enheter. En enskild enhets status kan variera beroende på kontraktets typ och värde. Alltså krävs en analys i varje enskilt fall.

I studien har identifierats sex omständigheter som kan vara av betydelse vid bedömningen av om kontraktsvärdet ska uppskattas för den enskilda enheten i stället för att läggas samman med alla enheter inom myndigheten. Dessa är:

1) Enheten har en separat budgetpost som hanteras av enheten själv och genom vilken de upphandlade kontrakten betalas

Olika upphandlande enheter har olika tillvägagångssätt för att bevilja budgetposter och delegera beslutanderätten för att handskas med dessa medel. Exempelvis kan vissa kommuner anslå budgetposter endast på kommunnämndsnivå eller per en viss förvaltning, medan andra ger varje skola en egen budget som sköts av rektor eller skolstyrelse.

2) Enheten sköter upphandlingsprocessen självständigt

En omständighet som pekar på att enheten kan agera med den självständighet som krävs är att den har de resurser och den kompetens som krävs för att utföra upphandlingsprocessen på egen hand. För att avgöra detta kan bland annat följande omständigheter tas i beaktande:

- Måste enheten söka godkännande från en annan del av den upphandlande myndigheten innan upphandlingsprocessen eller kontraktsskrivande inleds?
- Arbetar de personer som är ansvariga för upphandlingen inom den aktuella enheten?
- Genomförs upphandlingen av externa konsulter och bekostats de i så fall av enheten själv?

3) Befogenhet att fatta inköpsbeslut och sluta kontrakt å den upphandlande myndighetens vägnar

Har den eller de som ansvarar för enheten befogenhet att fatta de beslut som krävs för den aktuella upphandlingen? Särskilt inom kommuner och landsting är den

befogenhet att fatta inköpsbeslut som är delegerad till de enheter eller tjänstemän vilka ansvarar för enheterna ofta begränsad till en viss summa pengar. Det kan därför vara av betydelse att försöka avgöra om den aktuella anskaffningen ligger inom ramen för det värde som enheten själv har mandat att fatta beslut för.

4) Har någon annan del av den upphandlande myndigheten inverkan på kontraktet mellan enheten och dess leverantör?

Om den upphandlande myndigheten som helhet försöker utnyttja sin position som en större inköpare för att en enskild enhet på så vis ska erhålla mer fördelaktiga priser eller kontraktsvillkor kan detta tyda på att upphandlingen inte genomförs på ett så självständigt vis som krävs. Andra omständigheter som kan påverka bedömningen till förmån för att inte se enheten som självständig i förhållande till myndigheten i övrigt, är om enhetens köp är kopplade till rabatter för större inköp som har förhandlats fram av den upphandlande myndigheten.

5) Kommer andra enheter inom en upphandlande myndighet att göra inköp med stöd av det kontrakt som den enskilda enheten har tilldelat?

Om andra enheter inom en upphandlande myndighet kommer göra inköp med stöd av ett kontrakt som tilldelats av en enhet inom den upphandlande myndigheten, så kan kontraktets värde inte beräknas enbart per respektive enhet.

6) Skyldighet att göra inköp genom centrala ramavtal eller kontrakt

Om en upphandlande myndighet är tvungen att använda vissa ramavtal eller kontrakt som har ingåtts av en inköpscentral eller myndighetens egen centraliserade upphandlingsfunktion brukar ett sådant krav omfatta alla enheter inom samma upphandlande myndighet. Ofta har upphandlande myndigheter upphandlingsstrategier, interna riktlinjer eller regleringar som kräver att vissa typer av varor och tjänster ska köpas in genom gemensamma, centraliserade lösningar. Vissa av dessa är lagstadgade, andra är bara rekommendationer. Det är viktigt att notera att en och samma enskilda enhet kan ses som självständig och separat i förhållande till vissa byggentreprenader, varor eller tjänster, medan den i förhållande till andra varor eller tjänster måste använda en upphandlande myndighets centrala kontrakt och därför också tillämpa sammanläggningsreglerna.

Summary

Under the public procurement rules contracting authorities are, among others, central government and local government entities. In addition, these public procurement rules are applied to contracts awarded by "bodies governed by public law", which include e.g. the State and municipality owned entities provided that their activities are of general interest and not commercial or industrial by nature.

The new Swedish Public Procurement Act *Lag (2016:1145) om offentlig upphandling* (later referred as "*LOU*") implementing Procurement Directive 2014/24 was adopted by the Swedish Parliament on 30 November 2016 and entered into force in January 2017. Prior to the adoption of new rules separate operational units were not mentioned or recognized under LOU. The concept of separate operational unit was introduced in Art. 5(2) of Directive 2014/24 which sets rules for the calculation of contract value in the event where a contracting authority is comprised of several independent units.

According to Art. 5(2)

> "Where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all the individual operational units.
>
> Notwithstanding the first subparagraph, where a separate operational unit is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question."

In practice, this means that the value of a contract awarded by separate unit is subject to unit's independence. The conditions to be taken into account when establishing the status of the unit are set out in the recitals of Procurement Directive 2014/24. Such independence may be assumed if the unit independently runs the tender procedures, makes the buying decisions, has a separate budget line at its disposal for the purchases concerned, concludes the contract independently and finances it from a budget which it has at its disposal.

Background

The background of the rules on separate operational units is not discussed in Directive 2014/24. Actually such rules were not even included in the Commission's draft for new Procurement Directive from 2011. Nonetheless, the issue was no novelty in the field of EU public procurement law. More than 20 years ago, in January 1993, the European Commission published guidelines on contracts awarded by separate units in the utilities sector "Policy Guidelines on Contracts Awarded by Separate Units of a Contracting Entity under Dir. 90/531/EEC (Utilities)".

Likely, one of the reasons for publishing such guidelines are to be found in UK. The concept of "discrete operational unit" was originally developed by the Her Majesty's Treasury in the beginning of the 1990s. The concept served as an exception to the general rule that the values of contracts had to be aggregated for the purposes of the relevant threshold. No examples were provided in the UK's national regulations at that time. But, locally maintained schools were considered to fall within this exception.

What is a contracting authority?

In addition to the concept of separate operational unit, the definition of a *contracting authority* is of importance when determining to what extent the purchases should be aggregated. Due to the ambiguities relating to the exact definition of a contracting authority, the Swedish authorities have adopted different interpretations in practice. For example, some large municipalities have suggested that each of their offices or schools are independent parts of an authority and therefore these units should not be required to aggregate their purchases with any other part of the same authority when determining their contract value. Prior to the adoption of Procurement Directive 2014/24, public procurement rules at the classical sector did not directly support such interpretation.

The purpose of the aggregation rules is to avoid contract-splitting and other actions which can result to circumvention of the EU public procurement rules. As professor Sue Arrowsmith has submitted, intentional contract-splitting is hard to prove and the aggregation rules remove the need to prove a motive. They also contribute to the effectiveness and wider applicability of the public procurement rules, as the thresholds are more often exceeded than in cases where the value would be based on a single purchase.[2] The accumulation of purchases within the same contracting authority can be exempted for objective reasons. It is for the separate operational unit and the contracting authority to establish the existence of such reasons and provide evidence thereto.

Under Art. 5 of the Directive 2014/24, the method for calculation of contract value is based on purchases through a certain contract or under a certain period of time. The Directive 2014/24 defines the authorities covered by the rules, but does not expressly reply to what is considered as one and the same contracting authority. Consequently, the interpretation on what is considered one and the same contracting authority varies across the member states. It is ambiguous, whether the definition of a contracting authority requires a separate legal personality or is any public authority operating within State, region or municipality also a contracting authority. In the countries covered in this study, purchases of different State authorities are usually not aggregated. In some countries the government

[2] Arrowsmith 2014, pp. 462–463

authorities are considered as different contracting authorities where as in some others these are separate operational units within the State.

The question of whether a unit without a distinct legal personality can be regarded as a contracting authority has not been addressed in EU law. The division of powers and aggregation rules within authorities has often been seen as a matter of national law. At the municipal level, the interpretations vary. It appears that under Swedish administrative law, each municipal committee (*nämnd*) is considered as a separate public authority. According to Swedish Procurement Act (LOU) these local government authorities are also contracting authorities. Thus, under LOU a municipality or a region may be comprised of several contracting authorities. Also in France and Spain, municipalities may be comprised of different contracting authorities whose purchases are not required to be aggregated. On the other hand, in Germany, a municipality is considered as one contracting authority. This is due to the fact that German procurement rules relate the definition of a contracting authority to entities with distinct legal personality.

Separate operational units are not independent contracting authorities

In Swedish legal literature the definitions of *contracting authorities* and *separate operational units* have often been misunderstood to be synonyms. It has been submitted that in the context of public procurement rules these separate operational units would also be separate contracting authorities. This approach seems to be contradictory to the European Commission's views as well as views presented in the Swedish legislative proposal (Prop. 2015/16:195). According to the above-mentioned Commission's policy guidelines the separate operational units are part of a contracting entity, not contracting entities as such. In addition, the wording of Art. 5 (2) of Directive 2014/24 clearly states that units are not contracting authorities but rather a part of it.

A difference between the concepts of a contracting authority and of a separate operational unit should be made - aggregation rules apply within the same contracting authority, but not among different contracting authorities unless such contracting authorities have decided to run a joint contract award procedure.

Check-list for establishing the independence of a separate operational unit

As a starting point the purchases of independent units are aggregated. Nevertheless, for objective reasons, the contract value can be based at the level of a single unit. Several aspects can to be taken into account when determining the independence of a unit. For the purposes of this study, no definite examples of separate operational units can be given. The status of an individual unit may vary

depending on the nature and the value of the contract. Thus, a case-by-case analysis is required regarding each unit and each contract award.

In order to facilitate the evaluation of a unit's status, this study identifies six key elements which can be of importance when determining, whether the contract value can be estimated at the level of a separate unit or, whether all purchases of units within the same contracting authority should be aggregated:

1) The unit has a separate budget line which is managed by the unit itself and from which the procured items are paid from

Different contracting units have different practices to grant budgets and to delegate powers for the use of funds. For example, in some municipalities the budget lines are assigned only to the level of municipal committees or departments where as in others, each school may have independent budgets managed by the principal or the school board.

2) The unit runs the tender procedure independently

The unit is required to have the resources and competence to run procurement procedures independently. To determine whether the tender procedure has been run independently, attention can be paid, among others, to the following details:

- Is the unit required to seek pre-approval from another part of the contracting authority before initiating the tender procedure or before concluding a contract?
- Are persons responsible for the procurement working within the unit in question?
- Are the external consultants involved in the procurement acquired on the initiative and funds budgeted for the unit concerned?

3) Competence to make buying decisions and to conclude contracts on behalf of the contracting authority

Does the public official or managing body in charge of the unit have powers to make decisions equivalent of the contract value in question? Especially at the municipal and regional sector, the powers to make buying decisions delegated to units or the public officials in charge of those units are usually limited to a certain amount of money. Thus, it is of importance to establish whether the value of the procurement falls within the decision making powers of the unit.

4) Is any other part of contracting authority interfering or affecting the contract between the unit and its contractor?

If a contracting authority is trying to exploit its overall position as a major purchaser i.e. the prices or terms of contract of a unit are negotiated by the contracting authority, the unit may not be acting as independently as it is required in order to rely on the exemption to the aggregation rule. A unit's independency may be compromised also if its purchase prices are tied to major purchaser discounts of the contracting authority.

5) Will other units of the same contracting authority purchase through the contract awarded by the unit?

If other units of the contracting authority will purchase through a contract awarded by a unit within the contracting authority, the value of the contract cannot be estimated solely at the level of each unit.

6) Obligation to purchase through centralized framework agreements or contracts

If a contracting authority is required to use certain framework agreements or contracts concluded by a central purchasing body or centralized procurement function of the authority itself, such obligation usually covers all the units within the same contracting authority. Often different procurement strategies, internal decisions or regulations require that certain categories of products and services are purchased through centralized arrangements of the contracting authority. Some of these are binding by-laws, but some are mere recommendations. Whether or not an obligation to purchase through centralized arrangements exists, is subject to national law or these internal rules. It can be argued that if a unit has a duty to purchase through centralized arrangements, it can not be considered as independent regarding purchases of items or services covered also by centralized framework agreements or contracts. Therefore the same individual unit may be considered independent and separate in relation to certain works, supplies and services, whereas regarding some other supplies or services obliged to use centralized contracts of contracting authority and subject to aggregation rules.

1 Introduction*

Both EU and national public procurement rules are applied to the award of procurement contracts of contracting authorities defined under the Procurement Directive 2014/24[3] and the current Swedish Procurement Act *Lag (2016:1145) om offentlig upphandling* (later referred as *"LOU"*). The rules set out, among others, central government and local government entities as contracting authorities. In addition, public procurement rules are to be applied by "bodies governed by public law". These bodies include for example State and municipality owned undertakings provided that their activities are of general interest and not commercial or industrial by nature.[4]

Since the original transposition of public procurement rules in Sweden in 1994, the definition of a contracting authority has often been viewed from a national perspective reflected by the definition of a public authority under national administrative law. For the first time, the concept of a "separate operational unit" was introduced in EU procurement legislation in Art. 5 (2) of the new Procurement Directive 2014/24 where the rules for the calculation of estimated procurement value are set out. According to Art. 5(2)

> "Where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all the individual operational units.
>
> Notwithstanding the first subparagraph, where a separate operational unit is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question."

In practice, this means that the aggregation requirements of purchases by separate units are subject to these units meeting the criteria of adequate independence. The recitals of Directive 2014/24 provide indication on some of the relevant criteria that may be taken into consideration when establishing the independence of a unit. Independence may be assumed if the unit independently runs the tender procedures and makes the buying decisions, has a separate budget at its disposal

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[3] Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L 76/14.

[4] See C-44/96, *Mannesmann Anlagenbau Austria AG and Others*.

for the purchases concerned, concludes the contract independently and finances it from a budget which it has at its disposal.[5]

1.1 Research questions

The characteristics of a public authority under national rules, a contracting authority and separate operational unit under EU procurement rules are overlapping but also somewhat different. Due to the ambiguities relating to the exact definition of a contracting authority, the Swedish authorities have adopted different interpretations in practice. For example, some large municipalities have suggested that each of their offices or other units such as schools may be considered independent parts of an authority and therefore they would not be required to aggregate their purchases with other parts of the same authority when determining the contract value. Prior to the adoption of the new Procurement Directive 2014/24, codified public procurement rules did not directly support such interpretation although the European Commission had already in 1993 published guidelines at the utilities sector on contracts awarded by separate units.

Procurement Directive 2014/24 prohibits the splitting of contracts with the intention to prevent contracts from falling under the scope of the Directive. The question of which unit is considered as a separate operational unit under EU public procurement rules is relevant particularly for two different reasons. First, as set out in Art. 5 (2) of Procurement Directive 2014/24, the definition and interpretation of a unit's status is of great importance in the evaluation of estimated value of the contract. Independent unit's status as a separate operational unit or in comparison, a part of a larger contracting authority, is a decisive factor in the event the contract value of a single unit does not exceed national or EU thresholds, but would do so should it be considered as a part of larger contracting authority. The interpretation will therefore at times determine whether a contracting authority is in infringement of the procurement rules or not.

Secondly, interpretation of the unit's status affects the availability and gravity of remedies. Consequently, also the competence of the Swedish Competition Authority (*Konkurrensverket*) is subject to the value of the contract. Should a contract value fall under national thresholds, the remedies under Swedish Procurement Act (LOU) would not be available nor would Competition Authority be competent to apply fines. Hence it is of utmost importance to determine under which circumstances the contract value is aggregated. In addition, the interpretation adopted affects the gravity of remedies as repeated direct awards by the same contracting authority have been regarded as aggravating circumstances in Sweden.

[5] Recital 20 of Directive 2014/24.

This study addresses the following research questions:

- What is the background of the rules of a separate operational unit?
- What is a contracting authority?
- What are the criteria of independence for separate operational units?
- How these criteria should be interpreted?

1.2 Purpose and structure of the study

The purpose of this study is to clarify at what level the aggregation of purchases should be applied as well as to identify the background and criteria of separate operational units. After identifying the key elements and background of the rules on separate operational units, the study analyses the implications of the key findings to the application of remedies in public procurement, in particular regarding the parties in a litigation, the impact of different interpretations under national and EU rules as well as whether repeated infringements can be regarded as aggravating circumstances. The concept of separate operational units has been discussed across the EU. Perceptions adopted in other member states are gathered in the comparative chapter of this research report. Some member states have had national rules on separate operational units already for years whereas the issue has not even been discussed in many member states prior to the new 2014 directives. Finally, as a conclusion of the research, the study introduces a check-list on the elements that can be considered decisive when evaluating whether or not a certain unit is an independent operational unit.

The study focuses on Procurement Directive 2014/24, although similar rules on separate operational units are also incorporated into Art. 16 (2) of Utilities Directive 2014/25.[6] Therefore the conclusions can also be applied at the utilities sector. On the other hand, Concession Directive 2014/23 does not include rules on separate units.[7]

The author, a post-doc researcher in public procurement law from Finland, is familiar with Swedish language and the legal system in general. Nevertheless, due to the background of the author, this study is mainly based on the interpretation of EU public procurement rules and thus, unfortunately, all the fine tunings of Swedish administrative law have not been addressed in this report.

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[6] Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

[7] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.

1.3 Method

The research can be described as a desk research, a common research method in legal research including analysing existing data and different sources of legal information. For the purposes of comparative analysis, empirical data has been collected through a questionnaire. As the study aims to understand the *status quo* in Sweden and to define guidelines to EU law compliant approach regarding characteristics of separate units, the research method must therefore be based on legal dogmatics. The main purpose of public procurement rules is to ensure fair and non-discriminatory market conditions in public sector markets across EU. Thus, comparative law and qualitative empirical research elements as well as law and economics argumentation are of importance and reflected in the course of the study.

The comparative part of the research has been conducted by contacting academics and practitioners (country experts) across different member states including Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Spain and the UK.[8] Taking into consideration that this research has been conducted within a very limited time frame, the empirical data is not collected from a large sampling but from expert individuals.

[8] I would like to express my deepest gratitude for all public procurement experts who shared valuable and detailed information regarding their jurisdictions.

2 Separate operational units prior to 2014 Directives – where has the concept come from?

The starting point for the assessment of estimated contract value has been the aggregation of purchases within the same contracting authority. This has been the case also in Sweden. In the Swedish Government's proposal from 2009, it was submitted that purchases of same type within the same contracting authority should be aggregated when estimating the contract value. This principle is also codified in the current Swedish Procurement Act (LOU) s. 8, Chapter 19 which concerns contracts below EU thresholds.[9] Swedish Government further noted, that *the contracting authorities have the responsibility and a duty to control that the purchases of its departments and offices do not exceed the national thresholds*.[10]

Regardless of this general rule of aggregation, when a contracting authority is comprised of separate units, the contract value may be estimated at the level of a single unit. The background of the rules on separate operational units is not discussed in Directive 2014/24. Actually such rules were not even included in the Commission's draft for a new Procurement Directive from 2011.[11] Nonetheless, the issue was no novelty in the field of EU public procurement even though it had not been addressed, to the best of author's knowledge, in the Court of Justice of the European Union (later referred as "*CJEU*") case law. Already more than 20 years ago, in January 1993, the European Commission published guidelines on contracts awarded by separate units in the utilities sector "Policy Guidelines on Contracts Awarded by Separate Units of a Contracting Entity under Dir. 90/531/EEC (Utilities)".[12]

One of the reasons for publishing such guidelines are to be found in UK. The concept of "discrete operational unit" *was originally developed by the Her Majesty's Treasury*.[13] *Chappel* confirms that the concept finds no ancestry in any of the Directives, but is said to have been accepted by the European Commission. The concept of discrete operational unit provides an exception to the general rule that the values of regular or renewable services or supplies contracts have to be aggregated for the purposes of the relevant threshold. No examples were provided in the UK's Services Regulations or Supplies Regulations at that time. But, locally maintained schools were considered to fall within this exception. Also some local

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[9] Prop. 2009:10/180, p. 292

[10] Prop. 2009:10/180, p. 293.

[11] Commission staff working paper, COM(2011) 896 final.

[12] Policy guidelines CC/92/87 final, 20.1.1993.

[13] In an article in the Public Procurement Law Review, *Ian Harden* refers to the following HM Treasury's guidelines: Public Purchasing Policy: Consolidated Guidelines (August 1988); Guidance Notes on Public Sector Purchasing International Obligations: Supplies Contracts (dated April 1990); Guidance on the EC Works Directive May 3, 1990). See Harden *P.P.L.R.* 1992, pp. 372–373.

See also Chappel *P.P.L.R.* 1995, p. 124.

authority business units were claimed to fulfil the criteria of a discrete operational unit.[14]

Many utilities sought the European Commission's guidance on how the estimated value of a contract should be calculated when that procurement is carried by an individual operational unit by means of separate contracts. In particular, the utilities inquired whether it is acceptable to take as a basis only the value of the procurement of each unit and not of all the units of a contracting entity.[15] In the guidelines it was submitted that many utilities throughout the member states have devolved their procurement functions on to individual operational units which have a large autonomy in procurement. In its guidelines, the Commission suggested that this is usually motivated by commercial reasons such as the aim to reduce overhead costs, to increase efficiency and to improve accountability at the units. This devolvement of procurement and budgets, according to the Commission, can be seen as commercially efficient way of organising procurement in a large organisation. [16]

In 1993, the Commission addressed the devolvement of school management in UK and its impact on the methods for calculating the contract value. The transfer of powers from local education authorities to individual schools meant in practice that a school would not aggregate any purchases of other schools when determining the contract value. The Commission submitted that Public Supply Contract Directive 77/62/EEC (since superseded) does not expressly deal with the purchases by separate operational units of a contracting authority. At that time the UK rules implementing the directive on public supply contracts (The Public Supply Contracts Regulations, 1991) provided that where goods are purchased for the sole purposes of a discrete operational unit, which has the power to purchase such goods and the purchase is made independently of any other part of the contracting authority, only the purchase of such unit is taken into account for calculating the threshold above which the Directives apply. The Commission replied that such practices may contravene the Public Supply Contract Directive. Contrary to the interpretation of HM Treasury described above, the Commission expressly stated that regarding purchases under Public Service Contract Directive 92/50/EEC (since superseded) *the purchases made by separate operational units, such as locally managed schools, of the local authority, must be aggregated to calculate the threshold above which the Directive applies*. Moreover, this aggregation rule also applies for the purpose of calculating the threshold relating to the publication of prior information notices.[17]

For some reason at the utilities sector the Commission adopted a more flexible approach. This is reflected in the Policy Guidelines where the Commission refers to the Utilities Directive of that time and states that the approach in the utilities sector

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[14] Chappel *P.P.L.R.* 1995, p. 124.

[15] See Policy Guidelines, CC/92/87 final, p. 2.

[16] Policy Guidelines, CC/92/87 final, p. 2.

[17] Written question 380/93, OJ No C 207, 30.7.1993.

balances between sound commercial practice with transparency and monitoring. A case-by-case assessment is required, when deciding whether or not certain units can be treated as separate operational units.[18] In that regard, according to the Commission, it is crucial to establish, whether the contracting entity is truly organising its procurement in a decentralized way. If the units do not constitute discrete units, having a full capacity to award contracts, the purchases of all such non-independent units within same contracting authority shall be aggregated, when determining the estimated value of the contract.[19]

In the Policy Guidelines of contracts awarded by separate operational units in the utilities sector, the Commission presented cumulative characteristics to which the case-by-case analysis on the independence of a unit were to be based:

- procurement responsibilities are devolved: unit has competence to run the procedure for the award of contracts and make award decision independently of any other part of the contracting entity;
- the delegation of procurement responsibilities is reflected in the separation of budgets and the purchase is financed from its own budget;
- the contract is concluded by the unit;
- procurement is intended to satisfy a demand of that individual unit rather than a demand of more units or of the contracting entity as a whole;
- the contracting entity is not, when delegating the responsibility to the units, trying to exploit its overall position as a major purchaser with a view of obtaining more favourable terms.[20]

The starting point prior to the 2014 Directives has been the aggregation of purchases of all units within the same contracting authority.[21] Within the public sector, the approach has been stricter than regarding utilities procurement, where the characteristics of independence have been identified already in 1993. This list of characteristics for separate operational units in the utilities sector appears to be the basis of the new rules under Directive 2014/24.

To the best of the author's knowledge, the aggregation rules and separate operational units have not been addressed in the CJEU case law. There can be many reasons for this, but as discussed later, the aggregation rules have not received attention in many of the member states either. On the other hand, in the UK, the specific rules on discrete operational units have been applied for more than 20 years. According to *Chappel* this exemption to the main rule has not been challenged by an economic operator since they are not aware of its use in practice.

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[18] It should be noted that the terminology "separate operational unit" is already used in the 1993 Policy guidelines.

[19] See Policy guidelines, CC/92/87 final, p. 3.

[20] Policy Guidelines, CC/92/87 final, pp. 3–4. These guidelines are shortly discussed also by De Graaf *P.P.L.R.* 1993, pp. CS48–53.

[21] See Art. 5 (3) of Directive 2014/24 and Prop. 2015:16/195, p. 484.

Even the HM Treasury noted that specific rules on discrete operational units are needed due to the impracticability for each independent part of an organisation to know what other parts of the same organisation have purchased or intend to purchase. Thus, it is clear that a potential bidder has even less chance of discovering what is going on.[22]

[22] Chappel *P.P.L.R.* 1995, p. 124. *O'Loan* has also critized the possibilities for a potential supplier or service provider to challenge or even be aware of the separate operational unit's interpretation, see O'Loan *P.P.L.R.* 1997, p. CS68.

3 What is a contracting authority?

In addition to separate or discrete operational units, the definition of a contracting authority is of importance when determining to what extent the purchases should be aggregated. What is actually considered as one and the same contracting authority at the level of which the aggregation should take place?

According to Art. 2 (1) of Directive 2014/24 contracting authorities are the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law. The definition of a contracting authority regarding the criteria of "bodies governed by public law" in particular has often been addressed in CJEU case law and discussed in legal literature.[23] However, the discussion has usually concentrated on the question of which actors fulfil the criteria of "a body governed by public law" and very few legal sources are to be found as regards to the characteristics of a separate operational unit.[24]

During the legislative procedure for new Swedish public procurement rules, the Swedish Competition Authority requested the Swedish Government to clarify the relationship between a legal person, a contracting authority and a separate operational unit. In this regard, the Swedish Government noted that the purpose of the rules on separate operational units is solely to determine certain parts of contracting authority independent when determining the estimated contract value. The rules on separate units are not addressing, nor intending to address, the question of which entity is considered a contracting authority. The Government reminded that contracting authorities are defined under different rules, the ones transposing Art. 2 (1) of Directive 2014/24.[25]

Directive 2014/24 defines contracting authorities from the perspective of which actors are included in the scope of the Directive. The Directive does not address the question of what is considered as one and the same contracting authority in the sense of aggregation rules. *In other words, the Directive makes a division between the entities covered and not covered by the Directive, but does not expressly state at what level the aggregation of purchases is required.*

According to *Arrowsmith* it is clear that also entities without distinct legal personality may be regarded contracting authorities under the Directive as it covers also associations that have no legal personality. However, it is ambiguous whether any other distinct entity without a legal personality can be regarded as contracting authority in its own right. Arrowsmith asks whether the distinct units are covered

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[23] See CJEU case law referred in this Chapter and Clarke *E.P.P.P.L.R.* 2012, pp. 57–64 and Tvaronaviciene – Visinskis 2014, pp. 48 – 62.

[24] *Bovis* discusses the criteria of contracting authorities through different company and co-operation structures in detail, but does not mention separate operational units see Bovis 2007, pp. 191–227.

[25] Prop 2015:16/195, p. 486.

by the EU procurement rules even in the event where their functions would be purely commercial and they would not fulfil the criteria if they would have a separate legal personality?[26]

It can be submitted, based on the case law of CJEU in 31/87 *Beentjes* and C-44/96 *Mannesmann* that a unit within a public authority should not be assessed separately from the entity it is part of. In *Beentjes* a committee without a separate legal personality, whose members were appointed and whose activities were monitored by State authorities, was considered as a part of State and thus covered by the Directives.[27] It should be however noted, that the *Court did not reflect on what level the aggregation of purchases shall be made,* it just concluded that the committee's purchases fell under the scope of the Directive.

In C-44/96 *Mannesmann* the Court stated that the interpretation of whether a subsidiary undertaking of a contracting authority (a body governed by public law) is considered to be covered by the Procurement Directives, is resolved through the nature of its activities and whether the "parent" entity is considered as a contracting authority.[28] However, in Mannesmann it was a question of a subsidiary undertaking with a separate legal personality, not a separate unit within the same contracting authority. According to CJEU case law the fact that an organisation has its own legal personality and thus does not operate under the personality of State, regional or local authority, means that such organisation shall be evaluated under the criteria of bodies governed by public law.[29] The European Commission has submitted that authority owned undertakings, *the bodies governed by public law, are independent autonomous bodies whose purchases do not have to be aggregated with any other entity's purchases* for the purpose of calculating the threshold above which the Directives apply.[30] In other words, *if an entity has a separate legal personality, it is not a separate operational unit, but a contracting authority in its own right.*

The CJEU has held that the definition of a contracting authority, including a body governed by public law, must be interpreted in functional terms through the objectives of EU law.[31] In order to be defined as a body governed by public law within the meaning of the Directive an entity must satisfy the three cumulative conditions set out therein, requiring it to be a body established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, to possess legal personality and to be closely dependent on the State, regional or local authorities or other bodies governed by public law.[32]

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[26] Arrowsmith 2014, pp. 370–371.

[27] In *Beentjes*, the case concerned the State, however similar interpretation can be applied also to municipalities.

[28] C-44/96 *Mannesmann*, para 37–41.

[29] See C-353/96 *Commission v Ireland*, para 32–33.

[30] Written question No 380/93, OJ No C 207, 30.7.1993.

[31] C-237/99 *Commission v France*, para 43 and C-353/96 *Commission v Ireland*, para 36.

[32] See Art. 2 of Directive 2014/24 and cases C-283/00 *Commission v Spain* and C-214/00 *Commission v Spain*.

According to the European Commission's Policy Guidelines the aggregation of purchases should take place at the level of a contracting entity if the units are not considered independent.[33] Under Art. 5 of Directive 2014/24, the method for calculation of contract value is based on the purchases through a certain contract or under a certain period of time. *It is not explicitly stated "at what authority level" the aggregation should take place*. The only reference thereto is to be found in Art. 5(2) where the rules of aggregation regarding a contracting authority comprising of several units are set out. Nonetheless the paragraph does not provide any guidance of what is "one and the same contracting authority" in the context of aggregation rules. Is the definition of a contracting authority only reserved to entities with distinct legal personality or may any public authority operating under the personality of State, region or municipality be regarded as a contracting authority?

Based on the wording of Art. 2 (1) of Directive 2014/24, it is ambiguous whether the State or a municipality may consist of several contracting authorities or merely of several independent units. However, the Directive 2014/24 divides State authorities to central and sub-central authorities which apply different thresholds. According to Art. 2 (2): "central government authorities means contracting authorities in Annex I". *This could indicate that the different authorities within the State are also different contracting authorities*. In Annex 1, the central-contracting authorities of State are listed in a non-exhaustive way.[34] These do not have a separate legal personality, but are part of State. They have different areas of responsibility and the right to represent State within their sector. The Directive does not provide an explicit answer to whether the purchases within the whole State should be aggregated. But in many cases it would be very difficult or impossible to keep track of purchases of all State authorities. In most of the member states covered in this study, the different authorities within the State are considered independent and their purchases are not aggregated.[35] Whether this is due to the fact that they are considered different contracting authorities as suggested in the Directive or separate units within the State remains varies across the member states. A better view, it is submitted, is that the State actually is comprised of *different contracting authorities* even though central and sub-central authorities operate within the definition or legal personality of State, and lack the competence to make decisions and enter into contracts in their own right.

At the level of municipalities or regions for example, the Directive does not provide any guidance whether or not authorities within a municipality can be regarded as (separate) contracting authorities or merely units within one contracting authority. There is no official list of Swedish contracting authorities, but it has been suggested that committees (*nämnder*) within a municipality could be regarded as contracting authorities, though the legal situation is not clear.[36] If this would be the case, then

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[33] See CC/92/87 final, p. 3.

[34] See C-373/00 *Adolf Truley*, para 39.

[35] This is the case for example Belgium, Finland, France, Italy and UK.

[36] Rosén Andersson et al. 2015, pp. 201–202.

the aggregation would be required only at the level of municipal committees (*nämnder*).

In Sweden the definition of "a contracting authority" has often been viewed from the perspective of what is considered a public authority (*förvaltningsmyndighet*) under Swedish law.[37] It is however important to note that the definitions set out in EU Directives cannot solely be based on national law. According to the CJEU case law,

> "the need for uniform application of Community law and the principle of equality require that *the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community*; that interpretation must take into account the context of the provision and the purpose of the legislation in question".[38] *(emphasis added)*

The interpretation of what is considered as one contracting authority should be based on EU law taking into consideration the purpose of the EU legislation. A national interpretation, under which municipal authorities such as committees (*nämnder*), would be considered as different contracting authorities could result to some contracts falling outside the scope of the Procurement Directives when aggregation would be done at the level of committees instead of the whole municipality.

However, there are several aspects that support the interpretation that also bodies without separate legal personality could be regarded as contracting authorities. First of all, it seems that under Directive 2014/24, a State comprises of several contracting authorities that do not have a separate legal personality but are merely acting on behalf of the State. Also the fact that an association without a separate legal personality comprising of different authorities are considered as a contracting authority supports the view that the legal personality is not a requirement for an entity to be regarded as independent contracting authority.

The Swedish Government's legislative proposal from 2011 explicitly states that the municipal and regional committees (*nämnder*) are contracting authorities even though they do not have their own legal personality.[39] But the question of what authority level the aggregation should take place has not been addressed in Swedish legislative memorandums or case law. According to the s.22, Chapter 1 of the Swedish Public Procurement Act (LOU), contracting authorities are public authorities within the State and municipalities.[40] In an earlier legislative proposal from 2006, the Swedish Government noted that the definition of a public authority

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[37] Rosén Andersson et al. 2015, pp. 201–202. The discussion described in Prop. 2006/07:128, pp. 145–149 shows that the definition is ambiguous.

[38] C-373/00 *Adolf Truley*, para 35. See as well 327/82 *Ekro*, para11, C-287/98 *Linster*, para 43, C-357/98 *Yiadom*, para 26.

[39] "Den gemensamma nämnden är, liksom övriga nämnder i en kommun eller ett landsting, en egen myndighet men inte en egen juridisk person" (Prop. 2011/12:106, p. 37).

[40] In addition to these authorities also municipal council, bodies governed by public law and associations of contracting authorities are considered as a contracting authority under LOU.

in Sweden is based on the Instrument of Government *Regeringformen, Kungörelse (1974:152) om beslutad ny regeringsform* forming a part of Swedish Constitution.[41] According to the Instrument of Government, s. 8, Chapter 1, the administrative authorities (*förvaltningmyndigheter*) within the State and municipalities form the public administration. In the legal literature many scholars have considered that municipal committees (*nämnder*) are such administrative authorities (*förvaltningsmyndigheter*).[42] Thus, based on the wording of Swedish Public Procurement Act and reasoning in the legislative preparatory work, it appears that *in Sweden a municipality is in fact comprised of several contracting authorities*. Similar approaches have also been adopted in many other member states such as Spain and UK, where it has been considered that a municipality can comprise of multiple contracting authorities.

Even though under LOU's rules, the municipal committees (*nämnden*) are regarded as contracting authorities, the interpretation of who is one and the same contracting authority and at what level the aggregation is required varies under Swedish Appeal Court case law. In *Kammarrätten i Stockholm mål nr 1965-13*, the Appeal Court noted that the municipality is the contracting authority, but recognized that also a municipal committee (*nämnden*) can be a contracting authority in the context of public procurement rules. According to the Appeal Court the municipality had not shown that the contracting authority would have been other than the municipality itself even though the contracts were awarded by units operating under different municipal committees. On the other hand, in a more recent first instance case law, *Förvaltningsrätten i Stockholm mål nr 24947-15*, the Administrative Court of Stockholm found that a municipal committee (*nämnd*) is a separate function within a municipality and a separate contracting authority. Thus, according to the Administrative Court of Stockholm, *municipalities may be comprised of several contracting authorities even though they don't have their own legal personality*.

In Swedish legal literature the definition of contracting authorities and separate operational units have often been misunderstood to be synonyms. It has been submitted that in the context of public procurement rules separate operational units would also be separate contracting authorities.[43] This approach seems to be contradictory to the European Commission's views as well as views presented in the Swedish Government's proposal. According to the Commission's Policy Guidelines *the separate operational units are part of a contracting entity, not contracting entities as such*.[44] In addition the wording of Art. 5 (2) of the Directive 2014/24 clearly states that units are not contracting authorities but rather part of it: "[w]here a contracting authority is comprised of separate operational units". The independent units are regarded as separate units *for the purposes of calculation of estimated contract*

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[41] Prop. 2006:07/128, p. 147.

[42] Warnling-Nerep 2008, pp. 18–19, Hellner and Malmqvist 2010, p. 59. See also SOU 2010:29, p. 113

[43] Kammarkollegiet (2011), Rosén Andersson et al. 2015, p. 202 and Asplund et al. 2012, p. 84.

[44] See Commission policy guidelines CC/92/87.

value in an individual procurement. *The rules on separate operational units are not determining, which authority is regarded as contracting authority*.[45]

Already in the 1990s, according to the European Commission Policy Guidelines as well as in the UK's national regulations, the criteria of separate operational units were applied only to units within a contracting authority or a utility.[46] A separate operational unit is responsible for its procurement functions even though it is not formally an independent contracting authority.[47] The EU rules do not require that a separate operational unit would have to fulfil the criteria of contracting authorities. Actually, this would be contradictory to the concept of separate operational units itself. If the unit in question would be a contracting authority, its status would not be determined according to the rules of separate operational unit, but under the rules and definition of a contracting authority.

It may be concluded that within the context of EU public procurement rules, there can be several contracting authorities operating within the State. For example, the different central-government contracting authorities are listed in Annex of the Directive and they apply different thresholds than the sub-central authorities. Also if an entity has its own legal personality (body governed by public law), its purchases are not aggregated with any other entity or authority. Nonetheless, at the level of municipalities or regions, the legal situation is not clear, as in the CJEU case law concerning bodies governed by public law, the separate legal personality was considered an important feature for an entity not to be regarded as a part of another contracting authority. On the other hand, the wording of the Directive suggests that a separate legal personality is not a necessary feature in order to be regarded as a contracting authority: associations without a distinct legal personality and different State authorities are considered as separate contracting authorities under Art. 2 of Directive 2014/24. In the absence of explicit rules, many member states, Sweden included, have adopted an approach under which a municipality can be comprised of several different contracting authorities. This approach has also been accepted in Swedish first instance case law where municipal committees have been considered separate public authorities and therefore also a separate contracting authority. These contracting authorities can further be comprised of separate operational units.

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[45] Prop. 2015/16:195, p. 486. See also Ds 2014:25, p. 640 "Distinktionen görs enbart i avseende på tröskelvärdesberäkningen. Även om en separat operativ enhet befinns vara självständig i fråga om hela eller delar av sin upphandling är det inte fråga om en egen upphandlande myndighet i lagens mening."

[46] According to the Commission, the Policy Guidelines apply to situations where "separate operational units of one and the same contracting entity purchase products", Policy Guidelines CC/92/87/final, p. 1;

See also Harden *P.P.L.R.* 1992, p. 372, where it is submitted that the purpose UK's regulations on discrete operational units was to give managerial freedom to different departments, they were not given a separate legal identity. Lewis suggests the same, Lewis *P.P.L.R.* 1995, p. 135.

See also Written question No 380/93, OJ No C 207, 30.7.1993.

[47] Prop 2015:16/195, p. 484.

According to Art. 5(2) of Directive 2014/24, one contracting authority may be comprised of several independent units. For the purposes of this research i.e. determining the criteria of at what level the purchases should be aggregated, it is concluded that according to the EU rules, the aggregation can be done at a level of an independent unit. These separate operational units are not contracting authorities and therefore their status is not depending on the definition of a contracting authority or what is considered as a public authority under national law. *Separate operational units can be of any structure or form* (school, health center, kindergarten, IT service department etc.) *as long as it is an independent function within a contracting authority, has its own budget and meets the other criteria discussed below.*

4 Characteristics of a separate operational unit

The new Public Procurement Directives, Procurement Directive 2014/24, Utilities Directive 2014/25 and Concession Directive 2014/23 were adopted in February 2014. The deadline for national transposition expired in April 2016, but only few member states met the deadline. Since that many others have transposed at least some of the Directives, but at the moment of writing this report, by the end of 2016, a few member states have not yet transposed any of the Directives.[48]

Art. 5 of Directive 2014/24 concerns the calculation of estimated contract value. Similar rules were set out already under Art. 9 in the previous, since superseded, Directive 2004/18. However, the previous Procurement Directive from 2004 did not include any rules concerning separate operational units. It should also be noted that the new rules on separate operational units and the estimation of contract value were not included in the Commission's 2011 original proposal either. In fact, they were later added by the European Parliament.[49]

The rules on the calculation of estimated contract value are of importance, as they determine whether the EU threshold is exceeded and EU public procurement rules are applicable to the contract award in question. Nonetheless the national procurement rules are applicable below EU thresholds in many member states. In Sweden it is required under LOU that many provisions based on Directive 2014/24 are also applied to contracts below EU thresholds.[50]

This Chapter elaborates on the characteristics of separate operational units under Directive 2014/24, but also identifies other potential features which can be of importance when determining whether the aggregation of purchases may be done at the level of a single unit. Secondly, national ambiguities regarding national rules on calculation of contract value and the parties of litigation are discussed. Finally, this part of the study analyses the possibility to take aggravating circumstances, such as repeated infringements, into account when establishing the amount of procurement infringement fines.

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[48] Sweden adopted the new rules on 30 November 2016 and Finland on 13 December 2016. But Estonia, Croatia and Luxembourg have not yet transposed Directive 2014/24. On the other hand, Spain has reported transposition measures, but it has only implemented few individual articles from Directive 2014/24 http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex%3A32014L0024 (visited 17 December 2016).

[49] See Position of the European Parliament (2014), p. 13 and 121.

[50] According to the current s.2, Chapter 19 of Swedish Public Procurement Act (LOU), many EU procurement rules are actually applied also below EU thresholds including rules regarding the scope of application, definitions, remedies, competences of the monitoring authority as well as the procurement infringement fines.

4.1 Methods for calculating estimated contract value

According to Art. 5 (1-3) "Methods for calculating the estimated value of procurement" of Directive 2014/24:

> "1. The calculation of the estimated value of a procurement shall be based on the total payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.
>
> Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the procurement.
>
> 2. Where a contracting authority *is comprised of separate operational units, account shall be taken of the total estimated value for all the individual operational units.*
>
> *Notwithstanding the first subparagraph, where a separate operational unit is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question.*
>
> *3. The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.* […]" (*emphasis added*)

Directive 2014/24 reinforces the *anti-splitting rule* i.e. that the choice of the method used to calculate the estimated value of a contract shall not be made with the intention of circumventing the public procurement rules. Contracting authorities are required to carefully assess the value of a contract. A diligent estimation is particularly important when the estimated value of the contract is close or equivalent to the threshold value and thus it is uncertain, whether the contract value actually exceeds the national or EU thresholds.

Aggregation rules do not require that the purchases must be advertised as single contract. Under Art. 46 of Directive 2014/24 it is encouraged or required, depending on the national transposition of these rules, to divide the contract into smaller lots. The total estimated value of all the lots shall determine the rules applicable for each individual lot. Thus, even in the case where an individual lot would not exceed the EU threshold, the Directive would be applied.[51]

To estimate the value of the contract correctly is also relevant from the potential suppliers' perspective even in the event where the estimation of contract value would not have an impact on the selection of applicable rules e.g. when it is clear that the EU thresholds will be exceeded in any case. Different economic operators are interested in contracts of varying size. Like the CJEU concluded in C-549/14 *Finn Frogne*, the pool of interested operators and potential suppliers is subject to the

[51] Art. 5 (8) of Directive 2014/24. See as well Arrowsmith 2014, p. 463.

value of the contract.[52] The estimated value shall be valid at the moment at which the call for competition is sent[53] and it cannot be significantly changed during the award procedures or during the contract period.

Under Art. 5 (3) of Directive 2014/24 contracting authorities cannot split the contract or use methods of calculation aiming to exclude the contract from the scope of the Directive. Should the estimated value always be calculated at the level of individual units, this could result in practices where procurement functions would be decentralized with an intention to avoid the obligation to run a procurement procedure under national or EU public procurement rules. According to the European Commission's Policy Guidelines from 1993, it is relevant whether the decentralization of procurement functions is truly motivated by different needs, commercial reasons, better efficiency or for example by the geographical distances of the units. On the other hand, *Brown* suggests that the managerial and budgetary devolvement of different units is the key and thus whether or not these units operate under the same roof, is not relevant.[54]

If a procurement would be satisfying the needs of several units or the contracting authority as a whole, the purchases of all units, in the Commission's view, should be aggregated.[55] Same interpretation seems to apply under Directive 2014/24 as, according to the recitals, a subdivision is not justified where the contracting authority merely organises a procurement in a decentralised way.[56] In an article published in 1999, *Arrowsmith* noted that "the aggregation provisions of the Directives generally do not address the level at which aggregation is to take place in terms of the purchasing authority. Rather, they leave it open, whether it is necessary to aggregate all the purchases of each legal entity, or--in the case where there are separate sub-units of a single entity--only the purchases of each purchasing unit within the authority. Likewise there is no indication of whether it is necessary to aggregate the purchases of different entities which purchase together".[57] It is true that the Directives do not directly address this, although it can be argued, that the anti-splitting rules required already, at that time, aggregation of purchases within the same contracting authority. The European Commission interpreted the rules in a similar way. In the Policy Guidelines from 1993, the

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[52] In C-549/14 *Finn Frogne*, the CJEU held that increasing or decreasing the scope of the contract significantly can constitute a material modification of a contract and requires a new contract award procedure: "an amendment of the elements of a contract consisting in a reduction in the scope of that contract's subject matter may result in it being brought within reach of a greater number of economic operators. Provided that the original scope of the contract meant that only certain undertakings were capable of presenting an application or submitting a tender, any reduction in the scope of that contract may result in that contract being of interest also to smaller economic operators" (para 29)

[53] Art. 5 (4) of Directive 2014/24.

[54] "In theory, the United Kingdom derogation could also apply to procurement by different departments of a local authority, or even different colleges of a university, where they are given devolved budgets to purchase their own requirements independently, even though the different units still find themselves under the same roof." See Brown *P.P.L.R.* 1993, p. 77

[55] Policy Guidelines CC/92/87 final.

[56] See recital 20 of the Directive 2014/24.

[57] Arrowsmith *P.P.L.R.* 1999, p. 165.

Commission clearly states, that as a starting point, purchases of similar nature shall be aggregated within the same contracting entity.[58]

EU law does not dictate whether the authorities should organize their procurement in a centralized or a decentralized way. This is a managerial decision of the contracting authority itself. Nevertheless, the decentralization cannot be solely aimed at preventing contracts from falling under the scope of the Directives. But in practice, the true reasons and motivation behind the devolvement of procurement functions are difficult to prove.

4.2 Burden of proof

The starting point under Art 5 (2) of Directive 2014/24 is that the purchases of separate operational units within the same contracting authority shall be aggregated. Nonetheless where a separate operational unit is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question.

If the contract value has been estimated at the level of an individual unit in an event where the unit does not actually meet the criteria of independence, the false interpretation can lead to an infringement of EU procurement rules, when contract is not advertised and awarded in accordance with the Directive. This constitutes an illegal direct award, the most serious breach of public procurement rules. [59] The aggregation of all purchases within the same contracting authority being the starting point, the individual unit or the contracting authority is required to establish that the conditions of a separate operational unit are met. In its well-settled case law, the CJEU has concluded that *the burden of proof on justification for exempting from EU rules lays on the contracting authority*. Furthermore, all exemptions from the scope of the Procurement Directive or from the duty to publish a contract notice are to be interpreted strictly. The member states cannot allow direct awards in cases not provided for by Directives, or add new conditions to the cases expressly provided for by the Directives, which make that procedure easier to use.[60]

4.3 The characteristics of a separate operational unit under Directive 2014/24

The exact criteria or characteristics of a separate operational unit are not described in Directive 2014/24 although the recitals shed some light on the matter. According to recital 20

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[58] CC/92/87 final, p. 3.

[59] Recital 13 of Remedies Directive 2007/66. See also C-26/03 *Stadt Halle,* para 37.

[60] In C-385/02 *Commission v Italy*, para 23. See also C-601/10 *Commission v Greece,* para 32 and C-337/05, *Commission v Italy,* para 57–58.

> "[f]or the purposes of estimating the value of a given procurement, it should be clarified that it should be allowed to base the estimation of the value on a subdivision of the procurement *only where justified by objective reasons*. For instance, it could be justified to estimate contract values at the level of a separate operational unit of the contracting authority, such as for instance schools or kindergartens, provided that the unit in question is *independently responsible for its procurement*. This can be assumed where the separate operational unit *independently runs the procurement procedures and makes the buying decisions, has a separate budget line at its disposal for the procurements concerned, concludes the contract independently and finances it from a budget which it has at its disposal*. A subdivision is not justified where the contracting authority *merely organises a procurement in a decentralised way*." *(emphasis added)*

The assessment of whether or not a unit may be regarded as separate operational unit under the EU's public procurement rules requires a case-by-case analysis. There are several aspects to be considered which are discussed further below.

To the best of the author's knowledge, the exemption from the aggregation rule has not been addressed in CJEU case law nor in the UK national courts. However, the European Commission Policy Guidelines have had an impact on procurement practices in some member states such as Denmark, Netherlands and Poland years before the adoption of 2014 Directives. Danish Procurement Complaints Board has given several decisions on the calculation method of purchases by separate units within a contracting authority, whereas the Netherlands have imported the criteria of separate units into their national procurement guidelines and Poland to the national legislation. These national rules on separate operational units are described in detail later in the comparative chapter (Chapter 5) of this report.

The rules on separate operational units do not require a certain form or structure under which the units must operate as long as they fulfil the *objective criteria of independence*.[61] Therefore, the status cannot be derived from the name of the unit or its position in the organisation chart of the contracting authority. In the UK, where the rules on discrete operational units have been applied for decades, the UK Government guidance and legal literature provides some examples of these units. For example, the locally managed schools are considered as separate (distinct) operational units.[62] The European Commission challenged this interpretation already in 1990s.[63] The approach of EU rules has since changed as current Directive 2014/24 identifies schools and kindergartens as potential separate operational units. Nevertheless, it can be argued that no definite examples can be given *as the status of the individual unit may vary depending on the value or the subject matter of the contract in question.* A case-by-case analysis is required and thus, the examples of *schools and kindergartens*, provided in the recitals of the Directive 2014/24 cannot be interpreted

[61] The structure or the geographic location of a unit are not decisive elements, but rather the fact whether the devolvement of procurement functions is real. See Brown *P.P.L.R.* 1993, p. 77.

[62] See Chappel *P.P.L.R.* 1995, p. 124, Boyle *P.P.L.R.* 1995, p. 113 and Brown *P.P.L.R.* 1993, p. 77.

[63] Written question No 380/93, OJ No C 207, 30.7.1993.

in a way that all schools and kindergartens are considered independent separate operational units.[64] They can be, if justified by objective reasons.

Motive or intention of the unit or the contracting authority

For the purposes of estimating the value of a given procurement, it should be allowed to base the estimation of the value on a subdivision of the procurement only when justified by objective reasons.[65] Under the CJEU case law, exemptions from the public procurement rules cannot be justified by good intentions of the contracting authority or the fact that the contracting authority did not aim to circumvent the EU law. In C-574/10 *Commission v Germany*, the CJEU stated that the contracting authority's views on the uncertainty of funding or splitting contracts in order to enhance opportunities for SMEs do not constitute a reason to exempt from the aggregation rules. These uncertainties or objectives could have been addressed by EU public procurement law compliant measures, e.g. through contract provisions and dividing the contract into lots.[66] Thus, the good intentions of a unit is irrelevant if EU rules are breached.[67]

Separate budget

The recitals of Directive 2014/24 suggest that the unit is required to show that the contracting authority has *budgeted a separate budget line for the unit* and that *the purchases are actually paid from those budgeted funds*. Therefore, regardless of the unit's structure (department, institution, school, office, committee etc.), the unit may be considered separate, within the meaning of EU rules, if *it has its own budget* and meets the other requirements relating to independent procurement functions. *Different contracting authorities likely have different practices on what operational level the budget lines are set for* – this is within the discretion of the contracting authorities. Hence, it is not possible to define that all certain level departments, offices or schools within a municipality for example, shall be considered separate operational units, but this is subject to the internal by-laws of each municipality or region.

The EU rules do not limit the application of rules on separate operational units only to those units to which the central administration has directly set a separate budget line. Thus, any department or unit can be regarded as separate operational unit if, among other criteria, it has its own budget which it manages regardless of the fact

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[64] In a case of the Danish Complaints Board 2.5.2003, *L.R. Service ApS mod Sorø Kommune*, the applicant had sought guidance from European Commission regarding the interpretation of cleaning services of municipality's schools. The Complaints board had previously found that the aggregation of all schools' cleaning services is not required. In its response, Commission stated that such interpretation is contradictory to commission's views and that Danish authorities have misunderstood the rules of the Directive.

[65] Recital (20) of Directive 2014/24.

[66] C-574/10 *Commission v Germany*, para 45 – 48.

[67] Also *Arrowsmith* concludes that the prohibition to split contracts do not depend on motive or intention of a contracting authority, see Arrowsmith 2014, p. 465.

whether the budget powers are granted by a central administrative body or its subordinate authority to which further budget powers have been delegated to. In Sweden it is actually the subordinate authorities such as municipal committees (*nämnder)* that often decide on budgets within their own sectors.

Independent procurement procedure

In order for a unit to be considered as an independent unit, it should be independently responsible of conducting the procurement procedures. The unit *should not be required to seek for pre-approval* from any other part of the contracting authority for initiating procurement procedures, rendering an award decision or concluding a contract.[68] It should be noted that often the *powers to make buying decisions delegated to units or the public officials in charge of those units are limited to a certain amount of money.* For example, a department director or a principal of a school in a municipality can have competence, according to by-laws or code of conduct, to decide on purchases below 100 000 euros, but decisions exceeding this amount are required to be subjected to a committee or to a municipal council. In the event where the contract value would exceed the decision making powers of the principal of the school, it is likely that the school could not be considered separate operational unit regarding the said contract. The interpretation would be different, should the contract value remain within the decision making powers of the principal. Thus, *the status of a unit varies case by case and* is *subject to the value of the purchase*.

The interference of a contracting authority or rather the lack of independence of a unit can be reflected also through the contract terms. According to the European Commission's Policy Guidelines, a unit could not be considered independent if a contracting authority is still exploiting its overall position as a major purchaser in its discussion with tenderers with a view to obtaining more favourable terms.[69] This could mean in practice that *if the prices or terms of contract of a unit are tied to major purchaser discounts or terms negotiated by the parenting authority i.e. the contracting authority, the independent status of a unit could be compromised*.

The independency requirement of public procurement procedures does not require that all purchases shall be conducted solely by the unit's own employees. Obviously the unit in question has possibilities to employ external consultants or take advantage of external advice. Nevertheless, if persons responsible for the procurement are working in the central administration or in another part the procurement is prepared and conducted by employees of the "parenting" contracting authority without an affiliation to the unit in question, the independency of the unit could be questioned.

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[68] The Commission's policy guidelines, CC/92/87 final, state that unit shall be able to run procurement procedures and make buying decisions *independently without any other part of the contracting authority*. See also Arrowsmith 2014, p. 476.

[69] Commission's policy guidelines CC/92/87 final, p. 4.

The right to act on behalf of the contracting authority

As the separate operational units do not have their own legal personality, they act on behalf of the "parenting" contracting authority. *The powers to represent, make decisions and sign contracts on behalf of an authority* are often regulated under national laws or in public authority's by-laws or code of conduct. The competences of public officials are more of administrative law nature.[70] In the context of public procurement law, it is important, that the units have the powers to award contracts, make purchasing decisions and enter into contracts independently as a representative of the contracting authority. For example, the Swedish Public Authority Regulation (*Myndighetsförordningen* 2007:515) set outs the rules for State authorities. According to the s. 27 of the Swedish Public Authority Regulation, a public authority represents the State within its own sector and activities.

At the local government sector the right to represent or enter into contracts on behalf of the municipality is subject to the municipality council's decisions. Under the Swedish Municipality Act (*Kommunallag*) s. 3, Chapter 3, the responsibilities of a municipality are delegated to the municipal committees (*nämnder*). Further, under s. 13, Chapter 3, the committees have competence to make decisions, among others, on matters that the municipal council has delegated to them. Thus, the committees have the competence to make decisions on behalf of the municipality on matters within their area of responsibility. The municipal committees (*nämnder*) also have the powers, if granted by the municipal council, to delegate budgets and decision making powers further to subordinate authorities and bodies operating within its sector. Competence to make buying decisions may be delegated for a certain public official, the principal of the school for example. These characteristics of separate operational units are subject to the by-laws and decisions of the "parenting" contracting authority. The burden of proof to establish the true devolvement of procurement functions and delegation of managerial and decision making powers lies on the unit and the contracting authority themselves.

4.4 Characteristics not mentioned in Directive 2014/24

Directive 2014/24 identified a list of characteristics of independent separate operational units. This includes the competence to run independent procurement procedures, to make buying decisions and conclude contracts. Furthermore the unit must have a separate budget at its disposal. In addition to the criteria introduced at the recitals of Directive 2014/24, there can be other characteristics to consider.

Currently several contracting authorities are obliged to purchase through different centralized procurement framework agreement and contracts. In these next sections the duty to purchase through certain agreements or contracts are elaborated. But

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[70] Regarding the competences to enter into a contract on behalf of a public authority, see SOU 1994:136, p. 20, Kleineman *JT 1994–95*, pp. 936–71, Madell 1998, pp. 300–392 and Madell 2000, pp. 75–110.

before discussing the significance of such duty, the difference or similarity of procurement needs among different operational units is analysed. The European Commission referred in its Policy Guidelines from 1993 that the evaluation of contract value can not be based at the level of a single unit, if the contract is meant to satisfy the needs of several or all of the units within the same "parenting" entity.

4.4.1 Procurement to satisfy the needs of the unit itself

In the Commission's Policy Guidelines CC/92/87 it is submitted that

> "in assessing whether or not the Directive could be applied at the level of separate operational unit, due consideration needs to be given to whether or not:…the procurement is intended to satisfy a demand of that individual unit or whether such procurement is rather intended to satisfy a demand of more units or of the contracting entity as a whole, the procurement of which is merely organised in a decentralized way".

This seems to suggest that the fact whether or not different units have similar or different needs, could be decisive on the interpretation of unit's status. For example, the difference of needs can be a result of different geographical location, logistics or technical requirements.[71] According to *Brown*, the purchase of items required by most or all departments, such as stationery or cleaning services, is more likely to be made by the contracting authority as a whole, for reasons of efficiency and economy of scale. Nevertheless, in some large entities even without geographical division, the devolvement of budgetary powers and procurement functions has been considered to increase overall efficiency.[72]

Even though this condition is not mentioned in Directive 2014/24, the possibility for additional elements is left open as the list of characteristics is in the recitals and not in the article itself. Also the recitals include a partial reference to the Commission Policy Guidelines from 1993 stating that "subdivision is not justified where the contracting authority merely organises a procurement in a decentralised way". It is unclear what is meant with the concept that a contracting authority "merely organises procurement in a decentralised way".

Can the estimated value of a contract be assessed at the level of a single unit, if the purchases of supplies or services are similar in all units of within the same contracting authority? For example, the requirements and needs of stationary equipment or cleaning services in schools or kindergartens within a municipality are very similar. If the similarity of needs would be decisive when determining the aggregation rules and a unit's independence, the estimated value of contracts of individual schools or kindergartens would rarely be based on a single unit level.

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[71] See Commission policy guidelines CC/92/87.

[72] Brown *P.P.L.R.* 1993, pp. 77–78.

Directive 2014/24 does not provide guidance on how the aggregation rules should be interpreted in the event of similar needs of independent units. Is it enough that the budgets and procurement functions are devolved and the unit in question is independently responsible for the procurement? This question was addressed by the Danish Complaints Board in 19.8.2013, *EF Sikring A/S mod Aalborg Kommune,* where the Complaint Board considered that the value of all alarm services and equipment of different units and institutions of Aalborg municipality was not required to be aggregated as the alarm system purchases were both geographically as well as technically independent from each other. Furthermore, each contract was concluded at different times and it was the institution who decided, independently and without the impact of municipality, to which service provider it chooses to award the contract. In addition, each individual institution had its own budget, separated from the rest of the municipality's administration and institutions financed the services from those budget funds. Danish Complaints board found that the aggregation of all purchases of these independent units were not required.

In the abovementioned 19.8.2013, *EF Sikring A/S mod Aalborg Kommune* the procurement functions and budgets were truly devolved, but also there were differences between the needs of the separate operational units. Nevertheless, under earlier Danish case law, the differences of needs or similarities of purchases had not been decisive when determining the contract value for contracts awarded by separate operational unit. Rather, the Danish Complaints Board has stressed the true devolvement of procurement functions and the fact whether or not this has been motivated by the aim to prevent contracts from falling under the scope of the Directive. If the budget and procurement powers are truly devolved, the fact whether or not the independent units are purchasing same type of items is irrelevant. This interpretation finds support in Danish Complaints Board case 25.11.2002, *Skousen Husholdningsmaskiner mod Arbejdernes Andelsboligforening* where the Complaints Board found that the different social housing facilities within the same social housing association were independent units. Thus their purchases of white goods were not required to be aggregated even though the items purchased were of same type. However it must be noted that the above-presented case from 2013, *EF Sikring A/S mod Aalborg Kommune,* is the most recent one and thus under current Danish Complaints Board case law, the difference of needs seems to have some importance when establishing the relevant rules for calculation of contract value .

Some guidance for interpretation can be derived from the structure of Art. 5 of Directive 2014/24. First, the main principles of calculation are set out: these include anti-splitting rule and rules on separate contracting units. Then the actual calculation methods are described. According to Art. 5 (11), in the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based *the total actual value of the successive contracts of the same type* awarded during the preceding 12 months or financial year adjusted. It can be submitted that this paragraph does not require the aggregation of all purchases of different

independent units. Should the estimation be based at the level of a single unit, then only the same type contracts of the unit in question would be taken into account. Otherwise the independent units would have to make enquiries each time they intend to award a contract in order to make sure that no other units have the same need. Such interpretation would lead back to square one and calculation of contract value could rarely be based at the level of a single unit. In fact, if the contract value would be based at the level of a single unit only in the event where no other unit within the same contracting authority purchases or intends to purchase similar items, the exemption granted for separate operational units would not differ from the main rule. Having said that, it should be noted that the purchases of different independent units shall be aggregated in the event where these units are truly combining their needs and purchasing through the same contract.

It seems that he requirement of objective reasons is actually referring to the reasons that had motivated the devolvement of procurement functions in general and to the fulfilment of objective criteria of independence and not to the similarities or differences of items purchased.[73] *Thus, if units are independently responsible for their procurement and budgets are truly devolved within the contracting authority, for reasons of efficiency for example, the fact that whether or not all schools within the same contracting authority are purchasing similar items, should not be relevant when determining the estimated value of the contract and the status of a separate operational unit.*

4.4.2 Centralized purchasing – is there an obligation to use another framework agreement or a contract?

The possibility for contracting authorities to purchase from or through a central purchasing body was already stipulated in the previous Directive 2004/18.[74] Under Art. 37 of the current Directive 2014/24, the member states may provide that contracting authorities may acquire works, supplies or services from central purchasing bodies or through agreements concluded by such bodies. The use of framework agreements or dynamic purchasing systems operated by central purchasing bodies is not mandatory under EU law, but member states may stipulate, under national law, that the use of certain central purchasing bodies' agreements is mandatory. Such regulation has been adopted for example in Sweden, Finland and Italy for State authorities' purchases.

In Sweden, the Regulation on centralized procurement within the State (*Förordningen 1998:796 om statlig inköpssamordning*) requires that State authorities shall purchase through centralized framework agreements unless they find that a different form of contract is better for their purposes.[75] Should a State authority

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[73] Commission policy guidelines CC/92/87 and Brown *P.P.L.R.* 1993, pp. 77–78. Such interpretation finds support also in Rosén Andersson et al. 2015, p. 219.

[74] See Art. 11 of Directive 2004/18.

[75] "3 § En myndighet skall använda de avtal som avses i 2 § om myndigheten inte finner att en annan form av avtal sammantaget är bättre."

purchase through other arrangements than the framework agreements of *Kammarkollegiet*, the central purchasing body for Swedish State, it is required under s. 4 of the Regulation on centralized procurement within the State, to inform Kammarkollegiet on the reasons for such purchases.[76] Even though the State authorities have a duty to use Kammarkollegiet's framework agreements, the backdoor provided by the national regulation has been considered problematic as it has contributed to a situation where many State authorities are not using the agreements of Kammarkollegiet.[77] On the other hand the use of Swedish municipal and regional central purchasing body's, *SKL Kommentus*, framework agreements is voluntary.

In Finland the rules are similar. The Act on Public Contracts (*laki julkisista hankinnoista*) does not require the use of central purchasing bodies, but such obligations exist under the State Budget Act (*laki valtion talousarviosta 423/1988)* for State authorities. The authorities of Finnish State are required to purchase certain product and service categories through framework agreements concluded by the central purchasing body *Hansel Oy*, unless for a specific reason.[78] Also in Italy certain contracting authorities have an obligation to use framework agreements concluded by central purchasing bodies.[79]

In the absence of national legal provisions, the duty to purchase through centralized contracts can also be set out in internal by-laws or decisions of a contracting authority. For example, the principal of Stockholm University has decided that all faculties and departments of Stockholm University shall purchase through either local or State-wide framework agreements.[80]

Even though some contracting authorities have discretion over whether they purchase through framework agreements concluded by central purchasing bodies, they still may have binding by-laws regarding the centralization of purchases within the contracting authority itself. For example, the Finance Regulations of the city of Helsinki require that the procurement of certain product and service categories of all its offices is centralized.[81] Therefore these categories of products

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According to the 8 § of *Förordning (2007:824) med instruktion för Kammarkollegiet*, Kammarkollegiet is responsible to procure and establish framework agreements for State authorities.

[76] "4 § Kammarkollegiet ska verka för att avtal som avses i 2 § träffas. När en myndighet avser att upphandla utan att använda de avtal som avses i 2 §, ska Kammarkollegiet underrättas om skälen till detta."

[77] See Statskontoret (2009), pp. 54–55. "Ett grundläggande problem i det här scenariot är att de enskilda myndigheternas val av upphandlingsform, dvs. om de ska delta i den statliga inköpssamordningen eller inte... Myndigheterna väljer tvärtom medvetet en form före en annan, sannolikhet för att man finner den valda formen mer ekonomiskt fördelaktig. Exempelvis kan en stor myndighet med hög egen upphandlingskompetens och stor efterfrågan göra bedömningen att de kan åstadkomma bättre inköpsvillkor än vad som är möjligt inom ramen för den statliga inköpssamordningen."

[78] Finnish State Budget Act s. 22a and Ministry of Finance's decision 7.9.2006, 799/2006.

[79] Art. 37 of the new Italian Public Procurement Code (*Codice dei Contratti pubblici* – D.Lgs. 18 April 2016, n. 50).

[80] See Principal's decision from 7 October 2010 "Beslut om ny inköps- och upphandlingspolicy med tillhörande föreskrifter", Dnr SU810-2445-10, http://www.su.se/regelboken/bok-3/upphandling (2 November 2016).

[81] See www.hel.fi/static/helsinki/johtosaannot/Taloussaanto.doc (26 October 2016).

and services are purchased through city's own centralized framework agreements or contracts concluded by the internal centralized procurement function (Procument Center) operating within the city of Helsinki. This internal centralization of procurement functions is no novelty in Finland or in Sweden.[82]

Directive 2014/24 does not expressly refer, when determining the potential independent status of an internal unit, to the potential impact of centralized purchasing obligations, either through external central purchasing body or within the contracting authority itself. Nonetheless, if an obligation to use a certain framework agreement or a contract exists, it can be argued, that a unit cannot independently run procurement procedures outside these contracts, but must purchase from the supplier indicated by the central purchasing body or by the contracting authority to which it is a part of. Nonetheless, few ambiguities remain. First of all, one could submit that the failure to purchase through a centralized arrangement is "only" a breach of internal by-laws and thus not affecting the evaluation of unit's status under public procurement law. But on the other hand, public officials are required to follow these internal by-laws. They also the same by-laws that are decisive when determining the independence of a separate unit. Thus, it is submitted that the competence to make buying decisions delegated to separate operational units is connected to the other by-laws within the contracting authority in question. If the procurement of certain categories of products and services is centralized and all units within the same contracting authority are required to purchase through these centralized arrangements, an individual unit would likely lack the competence to freely and independently run procurement procedures.

Secondly, it can be questioned if any centralized purchasing obligations truly exist if the centralization of purchases is only addressed in non-binding recommendations or procurement strategies. It is also uncertain whether or not the mere existence of a framework agreement at State level would diminish the independence of any unit within the State, as these agreements as such do not usually constitute an obligation to purchase. This is subject to the terms of the framework agreement: some framework agreements are binding.[83] Also the obligation to purchase through central purchasing body's agreements under Swedish and Finnish law are subject to a contracting authority or a unit not finding a better contract (Sweden) or other special exemptions from such duty (Finland). Nonetheless, it can be submitted that in such cases, the unit in question would be required to establish objective reasons for not purchasing through those contracts in order to be considered independent.

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[82] Procurement of bulk product and services is often assigned to a certain internal purchasing unit. In Sweden these units or departments exist e.g. within Uppsala municipality https://www.uppsala.se/contentassets/e32b60700c1846668b196eb40daaa2d9/upphandlingspolicy-med-riktlinjer.pdf (1 November 2016) and Linköping municipality http://www.linkoping.se/naringsliv-och-arbete/upphandling-och-inkop/ (1 November 2016).

[83] The Framework agreements are not binding under Directive 2014/24, but contracting authorities can establish binding framework agreements as well if expressly agreed. See Andrecka *UrT* 2015, pp. 133–136.

Already 20 years ago, similar ideas were presented in the UK. In his article *Harden* refers to HM Treasury guidance on the Supplies Directive from the 1990s, which indicates that purchases cannot be treated as independent if individual purchasing officers are required to contract under a central arrangement or set of arrangements. Further, Harden suggests that if a discrete operational unit is administratively required to make use of framework arrangements made by the contracting authority, its decisions are clearly not independent and must be aggregated with those of other parts of the contracting authority. The same applies if such unit or contracting authority, to which the unit is a part of, "delegates upwards" the choice of supplier for its purchasing requirements to a central purchasing unit.[84]

A similar approach has been adopted in Danish Procurement Act (*Udbudsloven LOV nr 1564 af 15/12/2015*), though the Danish rules do not expressly address the situation where a unit *would be required* under law or *by-laws, to purchase through a certain contract but associates the criteria to an event where the unit is already purchasing through a contract* concluded by the contracting authority. Under Chapter 5, s. 31 (3) of the Danish Procurement Act, a unit may be considered independent, among others, if it is not using a procurement contract concluded by the contracting authority.[85]

If an authority, higher-up in the hierarchy, has set out an obligation to purchase certain works, supplies or services through a certain framework agreement or contracts, an individual unit would lack the competence to freely and independently run procurement procedures.[86] *Thus, the status of an internal unit seems to be dependent on the categories of works, supplies and services it intends to procure*. The wording of Art. 5 (3) of Directive 2014/24 supports this view as it indicates that there can be differences between the supply and service categories:

> "Notwithstanding the first subparagraph, where a separate operational unit is independently responsible for its procurement *or certain categories thereof*, the values may be estimated at the level of the unit in question." *(emphasis added)*

Hence, the same unit can be independently responsible for procurement in relation to categories which are not covered by any centralized contracts.

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[84] Harden *P.P.L.R.* 1992, p. 373.

[85] "Stk. 3. En decentral enhed er selv ansvarlig for en kontrakt i henhold til stk. 2, når enheden

1) selv står for gennemførelse af udbudsforretningen,

2) har et selvstændigt budget for det pågældende udbud, som den råder over, og

3) ikke benytter en indkøbsaftale, der er indgået af ordregiveren."

[86] Cr. recital (20) of Directive 2014/24, "…where the separate operational unit independently runs the procurement procedures and makes the buying decisions, has a separate budget line at its disposal for the procurements concerned, concludes the contract independently and finances it from a budget which it has at its disposal".

4.5 Some national ambiguities regarding separate operational units

4.5.1 Party in a litigation

During the legislative procedure of new procurement rules in Sweden, some interest groups submitted that the new national rules should clarify who is a party in judicial proceedings if the contract is awarded by a separate operational unit. In Sweden the legal situation, of whether the contracting authority or the separate operational unit should be the party of litigation, is unclear. According to the Swedish Government's legislative proposal, the provisions concerning remedies in public procurement assume that the contracting authority or entity whose decision is subject to the review proceeding, is the real party to the judicial proceedings. Furthermore, the right to represent an authority or unit in such proceedings must be seen primarily as an internal organizational issue. As a solution, the Government suggests that if a unit is considered independent regarding its procurement functions, the contracting authority to which the unit is part of, should establish who has the right to represent in the judicial proceedings and inform all interested parties thereof.[87]

EU law does not set out general procedural rules. Therefore, the party status of the separate operational unit is subject to national law. The CJEU has confirmed the procedural autonomy of member states on several occasions. In C-550/07 P *Azko Nobel Chemicals*, the Court concluded that, in accordance with the principle of national procedural autonomy and in the absence of European Union rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law.[88]

A separate operational unit, having awarded the contract and run the tender procedure independently, without the approval or consultation from any other part of the contracting authority, is obviously more familiar with the procurement in question and thus from a practical point of view, more appropriate party to the litigation. However, some aspects of national law support the view that "formally" the legal person to which the unit is a part of should be a party to a litigation. Generally under Swedish law, *only natural or legal persons may possess rights or obligations and thus have competence to appear in judicial proceedings*.[89] Public authorities like ministries, agencies, committees and institutions are not independent legal persons, but a part of State or regional or local authorities. Usually it is the legal person itself who is the party of procurement related

[87] Prop. 2015/16:195, p. 486.

[88] C-550/07 P *Azko Nobel Chemicals*, para 113.

[89] Ragnemalm 2014, pp. 59–60.

litigation, but it can and likely often will be represented by the unit, department or institution that actually awarded and concluded the procurement contract.

In case *Förvaltningsrätten i Stockholm, mål 21274-13*, the Gotland region claimed that the Swedish Competition Authority had started the judicial proceedings against the wrong authority. The Gotland region submitted that the region was not a contracting authority and that the right party to the litigation would have been a subordinate authority of the region. The Stockholm Administrative Court did not explicitly address the question of region's party status, but still considered the region responsible for the infringement in question by imposing fines to the region itself.

Although the starting point is that formally the parties in a litigation are either natural or legal persons, it is possible that in certain specific cases also entities without a separate legal personality may have an independent party status. For example, the Swedish Competition Authority, *Konkurrensverket*, has a specific procedural party status in procurement and competition cases due to its monitoring duties in that area. However, such independent party status should be set out by law and associated with the tasks of the authority in question.

Ministries and other public authorities within the Swedish State do not have their own legal personality, but are entitled to represent and act on behalf of the State. According to s. 27 of the Swedish Public Authority Regulation (*Myndighetsförordingen 2007:515*), a public authority represents the State within its own sector and activities. Thus, the authority, e.g. the ministry, which has been responsible of awarding and concluding the contract, shall be entitled to represent the State if judicial proceedings are initiated.[90]

According to the s. 6, Chapter 6, of the Swedish Municipal Act (*Kommunallag 1991:900*) the municipal board shall represent the municipality or the region in judicial proceedings. Nevertheless, the municipality or the region may also be represented by a committee (*nämnd*), unit or by a public official to whom the right to represent the municipality is delegated by law, decree or decision of the municipal council.[91] *Alf Bohlin* concludes that the municipal board cannot represent municipality or a region if the responsibility and duties in certain sectors such as health and social services or real estate and construction have been delegated to a specific committee *(nämnd*) or to an office within the municipality. Thus the

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[90] SOU 2004:23, p. 293.

[91] "6 § Styrelsen får själv eller genom ombud föra kommunens eller landstingets talan i alla mål och ärenden, om inte någon annan skall göra det på grund av lag eller annan författning eller beslut av fullmäktige.

Detta gäller också mål där någon har begärt laglighetsprövning av fullmäktiges beslut, om inte fullmäktige beslutar att själv föra talan i målet."

The rules are similar in Finland (Mäenpää 2007, pp. 241–242 and 247).

committees (*nämnden*) are the primary representatives of a municipality in cases relating to their sectors. [92]

It is also important to note that legal sanctions, including fines, are usually imposed only towards natural or legal persons regardless of who is acting as their representative.[93] This is due to the fact that national debt collection rules apply to legal persons.[94] On the other hand, in the context of public procurement law, the separate operational unit itself being independently responsible for its procurement procedures would rather be the "right" object for the fine. But even in the event where a separate operational unit is acting independently, it is formally acting on behalf of a contracting authority and the legal person it is a part of. Therefore, it is likely that the ultimate responsibility to pay the procurement infringement fine (*upphandlingsskadeavgift)* if due payment is neglected, lies on the legal person that the separate operational unit is a part of. Nonetheless it is in the discretion of the legal person to whom the sanctions are ordered to, to decide whether it will, through internal by-laws or a decision, roll the expense of administrative sanctions to the budget of the separate operational unit. On the other hand, it is possible that the national courts imposing procurement infringement fines and applying public procurement law are prone to more flexible and procurement practice derived approach to the party status of a separate unit. Hence it is possible that in certain cases the administrative courts will actually impose procurement infringement fines also directly towards separate operational units regardless of the lack of independent legal personality.

4.5.2 Aggregation rules for contracts not covered by Directive 2014/24 under Swedish Public Procurement Act

The rules governing contracts below EU threshold are set out in the Chapter 19 of the current Swedish Public Procurement Act (LOU). According to s. 8, Chapter 19, the aggregation of all purchases within the same contracting authority is expressly required.[95] In Sweden, prior to the adoption of Directive 2014/24, the same interpretation had generally been considered applicable to contracts above EU threshold as well, even though the same wording was not included in the LOU's rules applied to EU public procurement.[96]

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[92] Bohlin 2003, p. 49.

[93] Warnling-Nerep 2010, p. 99.

[94] See Utsökningsförordning (1981:981) and Lag (1993:891) om indrivning av statliga fordringar m.m.

[95] "Vid beräkningen ska den upphandlande myndigheten beakta direktupphandlingar av samma slag gjorda av myndigheten under räkenskapsåret."

[96] Prop 2009/10:180, p. 293 where the Swedish Government states that the principles and methods of calculations are inspired by the rules applied to award of contracts above EU threshold. "De bestämmelser med beräkningsprinciper som föreslås har sin förebild i reglerna om beräkning av värdet av ett kontrakt och om förbud i vissa fall mot att dela upp en upphandling som gäller får upphandlingar som omfattas av direktiven."

The methods of calculation of estimated contract value under the Directive 2014/24 came into effect in January 2017. Under s.4, Chapter 5 of the current LOU, applicable to contracts above EU threshold, the contract value could be based at the level of a separate operational unit if such unit is independently responsible for its procurement. However, at the same time, *no amendments were made to the rules applicable to contracts not covered by the Directive*.[97] This led to a legislative structure where the same unit is required to calculate the estimated value of a contract differently depending on the overall value of purchases of all the units within the same contracting authority and in some cases these two methods are contradicting each other.

This contradiction can be explained through an example:

> A local school, which fulfils the criteria for separate operational unit, purchases services for 800 000 SEK. It finds out that during the past year, other schools in the same municipality have purchased similar services for 1 500 000 SEK. According to the national rules of LOU, all the purchases would have to be aggregated and thus the estimated value of the contract would be 2 300 000 SEK. Therefore, the contract would exceed the relevant EU threshold. However, under s.4, Chapter 5, applicable to contracts above EU threshold, the method of calculation can be done at the level of the individual unit. By applying such method, the value of the contract would be 800 000 SEK and thus not covered by the rules of the Directive 2014/24. In this case the unit's contract award would again fall under LOU's national rules even though these rules would not recognize the subdivision of contract value at the level of a single unit.

In practice, this creates legal uncertainty for contracting authorities, independent units and for the monitoring authority. The different rules on the calculation of contract value depending on the contract value itself may result in difficulties, not only when determining the rules applicable, but also when assessing the correct amount of fines.

4.5.3 Repeated infringements as aggravating circumstance

If contracts falling under the scope of public procurement rules are awarded directly without advertising, the penalties for illegal direct awards can be applicable. The same contracting authority may be comprised of several operational units. If these units are not meeting the criteria of independence, but are falsely assuming so, their contracts may be considered illegal direct awards if the overall value of all units exceeds the threshold. Thus it is possible that several illegal direct awards occur within the same contracting authority within a short period of time. Such situation can be regarded as an aggravating circumstance under Swedish law, when determining the appropriate consequences for such infringements.

[97] See also Prop 2015/16:195 pp. 484–486 and 87–88

The procurement infringement fine was first introduced in the Remedies Directive 2007/66[98] which aims to enhance the efficiency of remedies in public procurement. According to the recitals of Directive 2007/66, new and more effective rules are necessary in order to combat illegal direct award of contracts, which also the CJEU considers as the most serious breaches of EU law in the field of public procurement.[99] If the principal remedy, the contractual ineffectiveness cannot be declared, a national court may impose alternative penalties. Alternative penalties should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract. Sweden has adopted only one of these alternative penalties, the imposition of fines. The Remedies Directive 2007/66 does not provide any further guidance regarding alternative penalties. In fact, the Remedies Directive clearly states, that it is *for the member states to determine the details of alternative penalties and the rules of their application*.[100]

The relevant rules regarding the alternative penalties are set out in Art. 2e of the Remedies Directive. According to Art. 2e (2), the alternative penalties must be effective, proportionate and dissuasive. Furthermore, it is submitted, that member states *may confer broad discretion* to the national judicial review bodies *to take into account all the relevant factors,* including the seriousness of the infringement and the behaviour of the contracting authority.

In Sweden, the minimum and maximum amount of fines are set with two different thresholds. Under the Swedish Procurement Act (LOU), the amount of procurement infringement fine may vary between 10 000 to 10 000 000 SEK. In addition, the fines cannot exceed 10 percent of the contract value. According to LOU s.4, Chapter 21, the contract value will be determined by applying methods for estimating the contract value under Chapter 5 (contracts covered by the Directive) and s.8, Chapter 19 (contracts not covered by the Directive). These thresholds of the amount of fines or the methods of calculation are not derived from the Remedies Directive 2007/66, but are of national origin.

The wording of s. 4, Chapter 21 of LOU and the explicit reference to the rules on calculation of contract value indicate that the exact amount of fines would be subject to the estimated value of the contract instead of the actual value. In Swedish case law, the aggregation of purchases is recognized when determining the duty to advertise the contract.[101] But for some reason this has not been reflected in the national case law. Furthermore the reasonings of Government's legislative proposal are somewhat contradictory on the matter and it remains unclear what has been the

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[98] Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts ("Remedies Directive") [2007] OJ 335/31.

[99] Recital 13 of Remedies Directive 2007/66. See also C-26/03 *Stadt Halle,* para 37.

[100] Recital 19 of Remedies Directive 2007/66.

[101] See Kammarrätten i Stockholm, mäl nr 2504-13.

purpose of the provision concerned.[102] In a decision by Gothenburg Administrative Court, *Förvaltningsrätten i Göteborg, mål 7173-16*, the fines were calculated based on a single contract value even though the court considered that the values of two separate contracts of similar nature needed to be aggregated in order to establish whether the thresholds were exceeded. This decision is not final and the case is currently in the Appeal Court.

Also in Finland the amount of fines is limited to 10 percent of the total contract value. According to the current Finnish Act on Public Contracts (*laki julkisista hankinnoista*), when deciding on the remedies, the court shall take into consideration the nature of contracting authority's infringement as well as the value of the contract in question, but the amount of fines cannot exceed 10 percent of the contract value. The amount of fines is subject to an overall assessment where the severity of the infringement is taken into consideration. The Finnish Market Court, the court of first instance in all procurement matters, generally provides very little argumentation in its case law on the assessment of the amount of fines in cases of direct award. Usually it just notes that the amount of fines is based on an overall assessment of the nature of the infringement and the value of the contract. The range is from 1,5 percent to 10 percent. Based on the Market Court case data, it appears that the higher the contract value, the lower the percentage of fines.[103] Repeated infringements are not mentioned in any of these cases concerning procurement infringement fines as a ground for aggravation. However, as the court can take into account the overall nature of the infringement, the repetitiveness of or awareness on the infringement may have an aggravating effect on the consequences of such infringement. In case *KHO 2016:114* the Finnish Supreme Administrative Court held that the *compensation payment*[104] should be significantly higher as the contracting authority's infringement of stand-still rules was intentional when it concluded a contract after having been informed on the complaint against the award decision and without even trying to seek for a lift of suspension.

Repeated infringements are regarded as an aggravating circumstance when issuing fines to contracting authorities in Norway.[105] This principle is adopted both in the

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[102] In the legislative proposal, the Swedish Government notes that the amount of fines is based on the contract value, calculated in accordance with the rules on estimated contract value (Prop. 2009/10:180, p. 198). This seems to suggest that the amount of fines would be based on the *aggregated contract value*. However later on, the Government notes that fines should be imposed towards a contracting authority only to the extent of their own actions which have contributed to illegal direct award (pp. 191 – 192).

[103] In Mao 891/15 the amount of fines was equivalent of approximately 6,7 %, in case MaO 464/15 (7,7 %), in MaO 3/15 (4,9 %), in MaO 189/14 (8,6 %), in MaO 57/14 (1,5 % but the contract value was significantly higher, around 4 MEUR), in MaO 205/13 (8,2 %, calculation based on the winning bid), in MaO 200/13 (3 %) and in MaO 259/13 (10 %). The percentage is difficult to determine in MaO 212-213/13 where transportation contract was divided into lots and the claim for fines was succesfull only based on certain routes.

[104] Compensation payment is a national remedy existing only in Finland, It has similar functions that compensation for damages, but the amount is limited to 10 percent of the contract value and is imposed by the Market Court instead of a general court which handle all damages cases in relation to public procurement. The compensation payment is paid to party suffering damage due to contracting authority's breach of public procurement rules.

[105] The information concerning Norway has been provided by Kristian Strømsnes and Linda Midtun, PhD candidates in the faculty of law, University of Bergen.

Norwegian Public Procurement Act (*Lov om offentlige anskaffelser, LOV-2016-06-17-73*) as well as in the case law. According to s. 14 (5) of Norwegian Public Procurement Act, "[w]hen determining sanctions, particular emphasis is placed on the severity of the violations, the size of the contract, whether the contracting authority has made repeated violations, the ability to restore competition and the deterrent effect. The court may combine sanctions. Administrative fines may not be higher than 15 percent of the contract value" (unofficial translation).[106] However, there are no rules governing for how long previous infringements can be taken into consideration. This remains in the court's discretion.[107] In case 2011/209 KOFA, Norwegian Complaints Board for Public Procurement, issued a fine of 7 % of the contract value. Later the contracting authority prolonged the same contract instead of terminating it. Thus KOFA issued a new fine of 15 % for the same, but now prolonged contract in case 2012/61.[108] Nonetheless the further developments of this particular contract in the Oslo district court finally led to reducing the fine.

Under Remedies Directive 2007/66, the member states have wide discretion to determine the details of alternative penalties as long as they can be considered as effective, proportionate and dissuasive. Thus, the principles of proportionality and effectiveness require that the amount of fines cannot be standardized, but rather they should be subject to the nature of the infringement and value of the procurement in question. In LOU, these principles are reflected through the current s.5, Chapter 21, according to which, the severity of the infringement should be taken into account when determining the amount of procurement infringement fine. Also in the Swedish legislative preparatory work it is submitted that courts may take into account the aggravating or mitigating circumstances.[109] Mitigating circumstances exist according to Swedish Supreme Administrative Court's decision *HFD 2014 ref 49*, for example in situations, where contracting authority is forced to enter into temporary, directly awarded contract due to stand-still requirements during judicial review proceedings concerning the original contract award.

Repeated infringements can be regarded as an aggravating circumstance.[110] This has been accepted also in Swedish case law.[111] In *HFD 2014 ref 69*, the Supreme Administrative Court noted that repeated infringements can be regarded as aggravating circumstance although in the case concerned, the court did not find any repeated the infringements. Taking into consideration that the details of

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[106] "Ved fastsettelse av sanksjoner skal det særlig legges vekt på bruddets grovhet, størrelsen på anskaffelsen, om oppdragsgiveren har foretatt gjentatte brudd, muligheten for å gjenopprette konkurransen og den preventive virkningen. Retten kan kombinere sanksjonene. Overtredelsesgebyret kan ikke settes høyere enn 15 prosent av anskaffelsens verdi."

[107] Until 2012 the KOFA, Norwegian Complaints Board for Public Procurement has had the powers to issue fines to contracting authorities in case of direct award. Since 2012, these powers have been transferred to Norwegian courts.

[108] See Bentzen Transport AB v Romerike Avfallsforedling IKS, 17 February 2014, case 2012/601.

[109] Prop. 2009/10:180, pp. 197–198.

[110] Prop. 2009/10:180, p. 198.

[111] See Rosén Andersson et al. 2013, pp. 724–725 where the authors refer to administrative court decisions Förvaltningsrätten i Växsjö, mål nr 286-12 and Förvaltningsrätten i Luleå mål nr 434-12E.

alternative penalties as well as the rules of their application are left to the discretion of member states, the current interpretation that repeated infringements can be regarded as an aggravating circumstance when determining the amount of fines is in compliance with the EU rules.

Repeated infringements can also be of relevance in cases where it becomes clear that several units within the same contracting authority are not meeting the independence criteria of separate operational units. In such case the procurements of these separate units are actually purchases by the contracting authority to which they are a part of. When different units within the same contracting authority have awarded contracts directly, a court may find that a contracting authority has repeatedly infringed procurement rules.[112]

Swedish Public Procurement Act (LOU) sets no clear rules to what extent or for how long the infringements of other units should be taken into consideration when determining the amount of fines. It is also unclear whether the infringement of a separate operational unit can be regarded as aggravating circumstance for a breach by another separate operational unit within the same contracting authority. In January 2017, the Administrative Court of Stockholm has addressed the issue relating to separate contracting authorities operating within the same municipality. In *Förvaltningsrätten i Stockholm mål nr 24947-15*, the Stockholm Administrative Court found that the procurement infringement fine for Stockholms municipal Contruction Committee's (fastighetsnämnd) direct award could not be aggravated due to an earlier direct award by Stockholm municipal Sports Committee (idrottsnämnd) as these committee were considered separate functions and two separate contracting authorities although both operating under the legal personality of Stockholm municipality. The decision is not final as there is a pending appeal at the Appeal Court (*Kammarrätt*).

The separate operational units are acting on behalf of a contracting authority and without a separate legal personality. Thus, the procurement infringement fines of any units without a distinct legal personality are usually imposed to the legal person itself.[113] According to an earlier legislative proposal by the Swedish Government, the contracting authorities have the responsibility and a duty to control that the purchases of its departments and offices do not exceed the national thresholds.[114] Even though this view was presented before the adoption of Directive 2014/24, it could be argued that some general duties of control remain at the contracting authority's side even though the units operate independently. Whether or not this could be a reason to consider infringements of other separate operational

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[112] Although the case did not result to imposition of fines, but the contractual ineffectiveness, the Stockholm Appeal Court found that it was the municipality who had breached the rules, when different units have awarded contracts within the municipality (see Kammarrätten i Stockholm, mål nr 1965-13),

[113] The fines in Förvaltningsrätten I Stockholm mål nr 24947-15 were imposed on the Stockholm municipality even though the committees were considered as contracting authorities. At level of separate operational units, the interpretation would likely be the same.

[114] Prop. 2009:10/180, p. 293.

units within the same contracting authority as aggravating circumstances, is questionable. If the units are truly independent, it could be submitted that a legal sanction that increases the amount of fines of an individual unit is disproportionate if this unit has not contributed in any way to the infringements by a different unit within the same contracting authority.

5 Approaches adopted in other EU and EEA member states

The method for calculation of contract value at the level of a single unit is a novelty in Sweden. As there is no national case law in Sweden on separate operational units or their characteristics, the approaches adopted in other member states can be useful in understanding the overall situation regarding separate operational units.

This Chapter is based on information and analysis received from academics and practitioners from 15 different member states: Belgium, Denmark, Estonia, Finland, France, Germany, Italy, Ireland, the Netherlands, Norway, Poland, Portugal, Romania, Spain and UK. The information was gathered through a questionnaire which was sent to country experts between August and October 2016. Based on the replies received, in some member states such as Denmark, Netherlands, Poland and especially the UK, the legal situation concerning separate operational units has been developing already for years, whereas in most of the countries concerned, separate operational units have not been discussed prior to the transposition of the Directive 2014/24.

5.1 Belgium (Baudoin Heuninckx)[115]

The central government entities such as ministries listed in Annex 1 of Directive 2014/24 are considered parts and separate units of Belgian Federal State, but the purchases of these units are not aggregated. According to the Art. 169 of the new Belgian public procurement Act (*loi du 17 Juin 2016 relative aux marchés publics*), all ministries are competent to award procurement contracts on behalf of the Federal State.[116] Also, Art. 1, 6°, of the *Arrêté royal du 3 avril 2013* (adopted on the basis of the previous public procurement legislation), confirms that the general administration of the Federal State comprises several independent operational units.[117] In practice, purchases within each of these units/ministries are aggregated, but the purchases of these units are not aggregated centrally, except when common contracts are awarded centrally for the benefit of various operational units. For other representatives of public authorities, the powers to make procurement decisions and award contracts are subject to an enabling law, decree or a statute.

The national Procurement Act in Belgium transposing Directive 2014/24 does not address or even mention the questions relating to calculation of estimated contract

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[115] This section is based on information and analysis received from Baudoin Heuninckx PhD, DSc, MCIPS, is Head of Legal Affairs and Litigation of the Belgian Armed Forces Procurement Division, part-time tutor at the Public Procurement Research Group of the University of Nottingham, and part-time lecturer in management at the Belgian Royal Military Academy.

[116] See http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=2016-07-14&numac=2016021053 (25 October 2016).

[117] See http://www.etaamb.be/fr/arrete-royal-du-03-avril-2013_n2013021025.html (25 October 2016).

value of separate operational units. The final transposition of Directive 2014/24 will be completed by royal decrees, which have not yet been adopted at the time of this report. Thus, the actual characteristics of a separate operational unit under Belgian law cannot be assessed yet. But based on the current rules on competence to make decisions on behalf of federal state it can *be concluded that in Belgium, the powers to act independently within a larger public authority, requires a specific decision, law or regulation in which these decision making powers are granted to a separate institution*.

5.2 Denmark (Grith Skovgaard Ølykke)[118]

Denmark has transposed the 2014/24 Directive with *Udbudsloven, LOV nr 1564 af 15/12/2015.*[119] According to s. 31 of the Danish Public Procurement Act, if a contracting authority consists of decentralised units, the estimated total value for all decentralised units shall be considered. However, where a decentralised unit has sole responsibility of the contract referred to, the value may be estimated for that unit alone. A decentralised unit is considered to be responsible for a contract when the unit: 1) is itself in charge of the performance of the procurement procedure, makes the award decision and concludes the contract; 2) controls a separate budget for the procurement procedure referred to, and 3) does not use a procurement contract[120] concluded by the contracting authority. The Danish legislative preparatory works do not provide much further clarification. Nevertheless, under Danish law, the *sui generis* evaluation is enforced. It is clear that in Denmark a separate unit may be independent as regards to certain contracts, but for other contracts the purchases of the unit may be aggregated with the overall purchases of the contracting authority. According to the Danish legislative proposal, a separate operating unit can be considered independent and separate if it does not use the contracting authority's contracts in the specific area.[121]

Unlike in the other countries where information was requested, the Danish Complaints Board has handled several cases on splitting of contracts relating to different units within the same contracting authority. In 1999, L.R. services filed a number of complaints regarding the procurement of cleaning services in different municipalities. In a verdict of 20.1.1999, *L.R. Service mod Sorø Kommune* the applicant had claimed that the municipality had to aggregate the value of all of the cleaning services in the municipality, e.g. institutions, the city Hall and so on, to decide whether an EU level tender must be conducted. The Complaint Board held that:

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[118] This Danish section is based on information and analysis received from the associate professor Grith Skovgaard Ølykke, Ph.D., Copenhagen Business School.

[119] Available in Danish: https://www.retsinformation.dk/eli/lta/2015/1564 (visited 25 October 2016)

And in English:
http://www.kfst.dk/~/media/KFST/Offentlig%20konkurrence/The%20Public%20Procurement%20Act/The%20Public%20Procurement%20Act.pdf (visited 25 October 2016).

[120] The English translation refers here to framework agreements (*rammeaftaler* in Danish) which translates more appropriately to *procurement contract* from *indkøbsaftale* is more appropriate.

[121] See Rapport fra udvalg om dansk udbudslovgivning (2014), p. 113.

"Regarding the cleaning of the City Hall, the point of departure for the Complaint Board is that the threshold is not exceeded, the services are individually tailored for the City Hall and there is no attempt at circumventing the rules. Thus, and since the Services Directive [92/50/EEC] in this case does not require an aggregation of the value of all of the cleaning services, this part of the complaint must be rejected." (*unofficial translation*)[122]

In case 28.5.1999, *L.R. Service ApS mod Bramsnæs Kommune*, the municipality had several contracts for cleaning services. Some of these were entered into by individual institutions of the municipality. There were no clear facts on how these institutions were managed in practice. Thus the Danish Complaints Board found that there was no evidence that these institutions were in fact independent. Additionally, the Board considered that the purpose of the rules on estimated contract value is to prevent division of contracts with the intention of avoiding an EU level tender. The EU procurement rules, according to the Danish Complaints Board, do not imply that a contracting authority under all circumstances must aggregate the value of its service contracts concerning similar services etc. Thus, the EU procurement rules do not contain a principle requiring aggregation of e.g. all cleaning service contracts entered into by a municipality. The Complaints Board did not find it likely that with the division of the procurement the municipality had attempted to contravene EU procurement rules. Irrespective of whether the institutions are self-managed, the Complaints Board did not have reasons to find that the municipality had breached EU's procurement rules with regard to their cleaning services.

The Complaints Board argumentation was similar in the case 28.5.1999, *L.R. Services ApS mod Ramsø Kommune*, where most of the cleaning services were provided by an in-house operator of the municipality. However, nine units of the municipality had outsourced their cleaning services to another company directly and thus without a public contract award procedure. All nine contracts were awarded to the same service provider. The Complaints Board found that although in practical and formal terms, these nine contracts were entered into by the central administration of Ramsø municipality as these units within the municipality did not have a separate legal personality, the municipality had not attempted to prevent the cleaning service contracts falling under the EU public procurement rules.

According to *Fabricius,* the case *L.R. Service ApS mod Bramsnæs Kommune* in 1999 caused the EU Commission to intervene, and it cannot be assumed that the older practice of the Complaints Board is still applicable.[123] Also Fabricius refers to the Policy Guidelines from the Commission on the utilities sector and states that

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[122] "For så vidt angår rengøringen af Sorø Rådhus lægger Klagenævnet til grund, at tærskelværdien ikke er overskredet, at der er tale om en efter rådhusets individuelle behov fastsat konkret ydelse, og at der ikke kan konstateres forsøg på omgåelse af udbudsreglerne hos indklagede. Herefter, og da der efter Tjenesteydelsesdirektivet i det foreliggende tilfælde ikke består pligt til at foretage sammenlægning af den økonomiske værdi af indklagedes samlede rengøringsbehov, tages klagerens øvrige påstande ikke til følge."

[123] Fabricius 2014, p. 150,

according to the European Commission, the purchases of units of the same contracting authority shall be aggregated unless the unit can be regarded as truly separate and independent through a case-by-case analysis.[124] It appears that subsequent to the Complaints Board decisions relating to cleaning services of several different municipalities, L.R. Service ApS made a complaint to the European Commission, who on 23 February 2001, announced that the Danish Complaints Board had adopted a different interpretation of the provisions regarding calculation of the estimated value of contracts than the European Commission.[125]

In the later case law concerning separate operational units of the Danish Complaints Board, the requirement of independence has been enforced. Case 25.11.2002, *Skousen Husholdningsmaskiner mod Arbejdernes Andelsboligforening* concerned a Danish social housing association which comprised of 56 separate housing facilities. Each of these housing units procured their white goods independently. The structure of the social housing association was based on Danish legislation on their social housing functions. According to the Danish Complaints Board the evaluation of separate housing units' position should be based on a case-by-case analysis and referred to the following characteristics in its ruling: 1) units were separate economic entities with their own savings, revenues, costs and accounts; 2) units could not be held responsible for obligations of the housing association or other units within the association; 3) units render their own decisions including procurement contract awards and the housing association does not have power to dispose the funds of an separate housing unit; 4) however, as the units are not separate legal persons, they cannot commit towards third parties independently, but are subject to housing association's approval on the expenses; 5) unit is rather independent regarding its own decision, as the housing association cannot remove or amend a decision by the unit by itself - in case of a disagreement it is the local council that shall be consulted; 6) generally, the units are also independent not only from the housing association but also from each other. Moreover, the Complaints Board submitted that the housing association could be regarded as the contracting authority, if it would have been coordinating the funds and contracts for all units in order to benefit from a major customer discount. As this was not the case, the Complaints Board considered the housing units to be separate units and thus each of them was responsible to comply with the EU's procurement rules within their own procurement.

In a more recent decision by the Danish Complaints Board 19.8.2013, *EF Sikring A/S mod Aalborg Kommune,* the applicant contested the lack of publication of contract awards by Aalborg Kommune during 2008-2011. The applicant argued that it was the express policy of the municipality to centrally coordinate procurements for all its institutions. Thus, according to the applicant, the total value of the procurement

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[124] Commission's Policy Guidelines CC/92/87 final.

[125] The statement of the European Commission is cited in Complaints Board's decision 2.5.2003, *L.R. Services mod Sorø Kommune*.

of alarms and thereto related services had to be aggregated in order to assess whether the thresholds are exceeded. The contracting authority, the municipality, argued that these contracts were decentralized and they had been entered into by its institutions whose alarm system purchases were both geographically as well as technically independent from each other. Furthermore, each contract was concluded in different time. In addition, it was the institution who decided, independently and without the impact of municipality, to which service provider it chooses to award the contract. In addition, each individual institution had its own budget, separated from the rest of the municipality's administration and institutions and financed the services from those budget funds. Further, the municipality argued that the value of these individual contracts was assessed independently from each other and the contracting institutions were regarded as separate contracting units. This approach was adopted also by the Complaints Board who rejected the claim and found that the procurement policy of the municipality does not imply that the value of all contracts of all the institutions, or contracts entered into each year, have to be aggregated in order to assess the estimated value of an individual contract.

5.3 Estonia (Marina Borodina, Mari Ann Simovart)[126]

As of submitting this report in December 2016, the new Procurement Directives have not been implemented in Estonia yet. Transposition into Estonian legislation is not likely before the beginning of 2017 but further delays cannot be excluded either.[127] The previous public procurement rules from 2007 (*Riigihangete seadus*)[128] do not define separate operational units. New Estonian Public Procurement Act has not yet entered into force, but the characteristics of a separate operational unit are discussed in the explanatory note. According to these legislative preparatory works, the independent operational unit has to meet the following criteria: 1) unit conducts public procurement awards independently; 2) makes public procurement decisions by itself and bears the responsibility for these decisions; 3) has a separate budget line allocated for financing its procurement; 4) independently enters into public contract and 5) finances the procurement from the budget the unit controls. According to the explanatory memorandum to the bill, the following could be regarded as separate operational units in Estonia: the faculties of a university, university clinics, units of the Defence Forces, regional police departments.

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[126] This Estonian section is based on information and analysis received from Marina Borodina, junior associate, COBALT Law Firm, and Mari Ann Simovart, Dr Iur, docent at University of Tartu, Faculty of Law. .

[127] The bill for the new Public Procurement Act, to be transposing all the three directives, was submitted to the parliament in April 2016 and underwent the first reading in may 2016. The legislative process can be followed here: http://www.riigikogu.ee/tegevus/eelnoud/eelnou/ecbd5b61-734c-41b1-bff5-a54f285bce53/Riigihangete%20seadus/

[128] The Estonian Public Procurement Act from 2007 is available also as an English translation at https://www.riigiteataja.ee/en/eli/530012014002/consolide

According to the legislative proposal these aforementioned units have the right to conduct their public procurements independently.[129]

In municipalities, for example in Tallinn, the capital city of Estonia, there are different operational units who are independently responsible for their procurement functions and conduct their purchases by their own. Each city district has even established their own internal procurements rules. But according to the annual procurements plans, the contract awards of certain city districts are to be conducted by Tallinn City Office. The purchases of laptops and cars for instance are centralized and purchased solely by Tallinn City Office.

5.4 Finland (by the author)

Finland will transpose the new public procurement rules in the beginning of 2017. At the time of writing this report, Finland had just adopted the new rules on 13 December 2016. According to the current Act on Public Contracts (*laki julkisista hankinnoista*), the estimated value of a contract would be based on the aggregated value of the purchases of all separate operational units within the same contracting authority. The purpose of this rule, according to the Finnish Government's legislative proposal, is to encourage contracting authorities to engage in well-planned procurement activity and to pool similar contracts into one in order to establish logical scope and size of contract. Nonetheless, in some cases the estimated value of a contract may be evaluated at the level of a single separate operational unit. According to the Government's proposal, this exemption to the main rule should be interpreted strictly. The value of the contract may be estimated on a single unit level only when there are objective reasons for such approach. This can be the case for example when a school, a kindergarten or a department is responsible for its procurement, conducts independently the award procedure, has the powers to award the contract and to order supplies and services, has a specific budget granted for such procurement, funds the purchase from the specific budget slot and has the power to conclude the contract independently.[130]

Previously, it has not been clear at what level the purchases within the contracting authority should be aggregated in order to determine the contract value. In Finland the contracting authorities have wide discretion on how to organise their procurement activities. At the State level, according to the State Budget Act (*laki valtion talousarviosta 423/1988)*[131] and the Budget Decree (*asetus valtion talousarviosta 1243/1992*)[132], the ministries, offices and institutes have their own budgets. These

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[129] See explanatory memorandum *(Seletuskiri*) of the draft proposal of *Riigihangete seadus 204 SE* pp. 51-52. Available in Estonian at: http://www.riigikogu.ee/tegevus/eelnoud/eelnou/ecbd5b61-734c-41b1-bff5-a54f285bce53/Riigihangete%20seadus/ (19 October 2016)

[130] HE 108/2016 p. 119.

[131] Available in English http://finlex.fi/en/laki/kaannokset/1988/en19880423 (11 November 2016).

[132] Available in English http://finlex.fi/en/laki/kaannokset/1992/en19921243 (11 November 2016).

units also have the responsibility to manage, plan and control their functions and to establish an operational and financial plan for several years ahead.

The procurement is partly centralized and partly decentralized among the Finnish State authorities. The government authorities shall under s.22a (2) of the State Budget Act purchase certain bulk products, services, IT-equipment and software through the framework agreements concluded by the central purchasing unit, Hansel Oy. Hansel Oy's mandatory contracts are defined by the Ministry of Finance's decision 7.9.2006, 799/2006. The Ministry decides which contracts government authorities are required to use and it may remove or add certain product and service categories thereto.[133] However, if for a special reason the purchase cannot be made through centralized framework agreements, the government authorities may organize the procurement in a different manner. Regardless of the obligation to purchase through certain centralized framework agreements, many authorities of the Finnish State are not following the binding rules, but purchase their products and services elsewhere.[134]

The duties and customers of Hansel Oy are defined in the Act on a limited liability company called Hansel Oy (*laki Hansel Oy -nimisestä osakeyhtiöstä 1096/2008*).[135] If a unit is required to use the framework agreements of Hansel, it cannot, unless for some specific reason, purchase products through other arrangements. These specific reasons include, among others, different product specifications or procurements abroad such as purchases by the Ministry of Foreign Affairs or procurement regarding development cooperation projects.[136] Therefore it can be argued that under the State Budget Act a unit operating within the Finnish State does not have full control on the use of its budget regarding the purchase of the products and services that it must purchase through Hansel Oy's frameworks. However, for now, there has been no real consequences for breaching these obligations.

On the other hand, units operating within municipalities or other contracting authorities do not have similar obligations, set out in national law, to use the framework agreements of central purchasing bodies. Nevertheless, it is possible that such binding by-laws have been imposed for example by the central administration of a municipality requiring all its units to purchase certain products or services through centralized framework agreements or contracts. For example, according to s. 29 of the Finance Regulations of the city of Helsinki, it is up to the

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[133] The obligation does not concern all entities of Finnish State.

[134] According to a report by National Audit Office of Finland in different product and service categories the purchases through Hansel Oy's contracts amounted between 13,2 – 83,1 percent of the total amount of purchases by the State. The use of centralized contracts was lowest on electricity (13,2 percent) and highest on employee health services (83,1 percent), see Valtiontalouden tarkastusvirasto (2011), pp. 40 – 41.

[135] Available in English, see http://finlex.fi/en/laki/kaannokset/2008/en20081096?search%5Btype%5D=pika&search%5Bpika%5D=laki%20Hansel%20Oy%20-nimisestä%20osakeyhtiöstä%20 (12 November 2016).

[136] The powers of the Ministry of Finance and the justified reasons to conduct own procurement procedure are discussed in detail in Pekkala and Pohjonen 2015, pp. 168–170.

municipal board to decide which supplies, services and works are purchased through centralized contracts and awarded by the centralized procurement function of the city of Helsinki.[137] The units of Helsinki have an obligation to purchase through centralized contracts the products and services set out in the binding municipal board's decision. Consequently, these units do not have discretion on how to spend their budget when purchasing products or services which fall under the categories of centralized arrangements.

5.5 France (Nicolas Gabayet)[138]

Under Art. 20 of the French public procurement regulations implementing the Directive 2014/24/EU (*Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics)*, the aggregation of all purchases of different units is a starting point, but the contract value may be estimated at the level of a single unit if this unit is independently responsible for its procurement activities or the procurement of certain product, service or works categories. The contracting authority cannot avoid the application of the French decree by splitting purchases or by using methods for calculating the estimated other than those provided in the provisions of the respective decree.

The official guidance on best practices published in 2012 suggests that one contracting authority may comprise of several units. It clarifies that the authorities have discretion to determine their respective procurement needs and methods, as long as their choices are not intended to circumvent the public procurement rules. It also suggests that the decision on who should be buying and what to buy is a managerial decision. According to this guidance on best practices, the definition of contracting authority does not require a separate legal personality. The French State comprises of several contracting authorities such as ministries, independents administrative authorities and courts. All these have the competence to award and enter into contract on behalf of State. Thus, the purchases within the State do not have to be aggregated.[139]

The guidance published by the French government also suggest that procurement functions may be decentralized to various units within a contracting authority if those units have some financial autonomy and are responsible for their budgets.[140] According to a public procurement auditing guide, the question of which unit can be regarded as a separate operational unit cannot be resolved through the organisational structure of the unit or by the definition and characteristics of contracting authorities under the procurement rules as a separate operational unit is not a independent legal person, but merely a department operating within a

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[137] Available in Finnish: www.hel.fi/static/helsinki/johtosaannot/Taloussaanto.doc (26 October 2016).

[138] This section is partly based on information received from Dr. Nicolas Gabayet, Maître de conférences, Université Paris-Est Créteil and partly to the own research of the author.

[139] Circulaire du 14 février 2012.

[140] Vade-mecum des marchés publics (2015).

contracting authority.[141]At the regional administrative level, the local administration shall decide on what level its purchases are evaluated. The purchases may be aggregated at the level of main budget of a local authority, or at the level of annex budgets or independent budgets of separate units depending on whether these entities have the legal capacity and are responsible for their own budgets. [142]

5.6 Germany (Christoph Krönke)[143]

Both under Art. 2 of Directive 2014/24/EU and under s. 99 of the German public procurement rules, Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB)*, the term "contracting authority" ("*öffentlicher Auftraggeber*") relates to entities with a distinct legal personality.[144] The municipalities, for example the city of Munich, would be considered as one and same contracting authority and would hence be party to a public contract. Just like many other contracting authorities in Germany, the city of Munich is comprised of several agencies ("*Behörden*") or "procurers" which are vested with the authority to independently award public contracts on behalf of the city of Munich. In practice, the purchases of these units are not aggregated.

Whether or not a unit is considered to be such independent agency/procurer, with the authority to award contracts on behalf of their respective contracting authority, is not a question of public procurement law. It is rather a question of the organizational rules forming part of German administrative law. In the first line, this is a matter of interpreting the term "*Behörde*" within the meaning of the applicable Code on Administrative Procedure ("*Verwaltungsverfahrensgesetz*" – VwVfG). On the federal level, s. 2 (4) of the VwVfG provides that "*Behörde*" is defined as "every unit carrying out tasks of public administration" ("*jede Stelle, die Aufgaben der öffentlichen Verwaltung wahrnimmt*"). The interpretation on whether or not a certain organizational unit is considered as an independent procurer, with the capacity to award contracts, certainly depends on the size and on the inner organizational structure of the contracting authority.

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[141] Guide d'audit d'un marché public, CHAI (Comité d'harmonisation de l'audit interne).

[142] Circulaire du 14 février 2012.

[143] This section is based on information and analysis received from Dr.jur. Christoph Krönke, a post-doc at Ludwig Maximilian University Munich, Germany, at the Institute of Public Policy and Law.

[144] Available in German at: https://www.gesetze-im-internet.de/gwb/ (30 November 2016)

5.7 Ireland (Abby Semple)[145]

In May 2016 Ireland transposed the Public Sector Directive 2014/24 and Utilities Directive 2014/25. Under s.6 (3) and (4) of the *S.I. No. 284 of 2016 European Union (Award of Public Authority Contracts) Regulations 2016*[146], by which Directive 2014/24 was implemented, where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all those units when calculating the estimated value of the procurement. However, if a separate operational unit is independently responsible for its procurement, or certain categories of its procurement, the value of the procurement may be estimated at the level of the unit concerned.

Even though departments within the same contracting authority are free to organise their procurement activities, the departments' powers are subject to internal regulations of the public authority in question as well as the rules concerning centralized procurement. Certain contracting authorities and consequently also the departments within those authorities are required to use the framework agreements for certain product and service categories of the central purchasing body, the Office of Government Procurement.[147] Such central arrangements are targeted at securing best value for money and facilitating contracting authorities to deliver services within their budgetary constraints. In addition, the Irish central purchasing unit has a wide range of other frameworks which are not mandatory.

5.8 Italy (Carol Cravero, Roberto Caranta, Mario Comba)[148]

In Italy public procurement is very decentralised throughout the central as well as local government comprising of 20 regions and 8000 municipalities, large number of bodies governed by public law and many different internal operational units. The use of a central purchasing body's frameworks is mandatory for certain contracting authorities on some product and service categories. Regardless of the decentralization of procurement, direct contract awards do not occur often in Italy, as a special Procurement Identification and Information Number (*CIG – Codice Identificativo Gara*) is required for each procurement. *ANAC* (Italian Anti-

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[145] This section is based on information and analysis received from a public procurement specialist Abby Semple. She has strong practical experience in delivering procurement project in Ireland, UK and at European level and is also the author of "A Practical Guide to Public Procurement", Oxford University Press 2015.

[146] Available at http://www.irishstatutebook.ie/eli/2016/si/284/made/en/print (12 October 2016).

[147] According to Circular --06/12: Public Procurement (Framework Agreements), there is a mandatory requirement for the public bodies to utilise central contracts, put in place by the National Procurement Service, currently transferred to Office of Government Procurement, when procuring a range of commonly acquired goods and services. Such central arrangements are targeted at securing best value for money and facilitating contracting authorities to deliver services within their budgetary constraints. In addition the Irish CPB however has a wide range of other contracts which are not mandatory.

[148] This section is based on the information and analysis received from a Ph.D. student Carol Cravero, professor Robero Caranta and professor Mario Comba.

Corruption Authority) is practicing *ex ante* monitoring for every contract and without the CIG code, the procurement cannot be completed.

Italy has transposed the 2014 Directives into *Codice degli Appalti (D.Lgs 50/2016)*.[149] The national rules under Art. 35(5) concerning separate operational unit's contract value estimation do not differ from the wording of the Art. 5 (3) of the Directive 2014/24. A separate operational unit is independently responsible for its procurement if the purchase of the products, services or works is based in its own budget and the contract is autonomously concluded using only the unit's financial resources. There are no explicit rules on which unit is considered as a separate operational unit. The characteristics of these units are normally established by each contracting authority through its own internal regulations. The delegation of powers within municipalities is regulated under Art. 13 of the Italian Local Government Act (*D.Lgs. n.267 del 18/08/2000)*. According to these rules, the Municipal Council, acting on the proposal of the mayor, is deciding on the division of powers, which will be enforced through regulations or internal decisions.

5.9 The Netherlands (Willem A. Janssen) [150]

The Dutch legislature has implemented the rules on separate operational units into art. 2.15a of the Dutch Public Procurement Act 2012 (*Aanbestedingswet 2012*).[151] The Dutch Public Procurement Act 2012 itself provides no further guidance on how to interpret an *afzonderlijke operationele eenheid* (separate operational unit). However, the Explanatory Memorandum of the amended Dutch Public Procurement Act 2012, which is considered to have strong value as a legal source, refers explicitly to the European Commission policy guidelines from 1993 for the interpretation of this article.[152] Prior to this explicit inclusion of the rules on separate operation units in 2016, the *Interdepartementaal Overlegorgaan Europese Aanbestedingen* already referred to these policy guidelines in 2002.[153] It considered that on the State level (the Dutch ministeries and its agencies) and on the level of municipalities (transport and waste collection entities or city districts *stadsdeelgemeenten)* could possibly be considered to be separate operational units.

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[149] Available in Italian at: http://www.codiceappalti.it/DLGS_50_2016/Art__35__Soglie_di_rilevanza_comunitaria_e_metodi_di_calcolo_del_valore_stimato_degli_appalti/8405 (25 October 2015)

[150] This section is based on information and analysis received from Willem A. Janssen, a PhD Researcher and Lecturer in (European) Public Procurement Law at the Public Procurement Research Centre of Utrecht University.

[151] The Act is available in Dutch at: http://wetten.overheid.nl/BWBR0032203/2016-07-01 (19 October 2016).

[152] Memorie van Toelichting (2012), p. 35.

These policy guidelines CC/92/87 are discussed above in the Chapter 2 of this report.

[153] The Interdepartementaal Overlegorgaan Europese Aanbestedingen (IOEA) was established in 1994 under the supervision of the Ministery of Economic Affairs. It consisted of all the Dutch ministries and respresentatives of the provinces and municipalities. It aimed to come to a consistent application of the EU public procurement rules by public authorities, see Interdepartementaal Overlegorgaan Europese Aanbestedingen 2002, p. 9.

There is currently no case-law of the Dutch courts considering these criteria. The Dutch *Commissie van Aanbestedingsexperts* (Commission of Procurement Experts) has, however, used the principles of the European Commission's policy guidelines as the standard of its assessment in 2014.[154] While its opinions are non-binding,[155] the Commission of Procurement Experts is seen as an authoritative body in the Netherlands.

In 2014, the Commission of Procurement Experts gave an opinion on a case regarding an "umbrella" organisation of 21 schools. This organisation conducted a contract award procedure for new cleaning service contracts on behalf of four of these schools. The organisation responsible for the contract awards claimed that the respective contracts did not meet the applicable thresholds, because it had negotiated four separate contracts that were each to be signed by the individual schools, which were allegedly separate operational units. However, the Commission of Procurement Experts concluded that the umbrella organisation had not established that the purchasing responsibility had in fact been delegated to the individual schools, because the organisation had in the past acted as a purchasing unit for the separate schools. The Commission of Procurement Experts noted that this responsibility could not change according to whatever situation was more preferable. Even though the schools concluded separate contracts and had separate budgets, the devolvement of procurement functions and the independent powers to manage the school budgets were not established. The schools were not responsible for their procurement procedures and fully independent, because the interference of the umbrella organisation was substantially present. The organisation was not only a facilitating partner, but it actively interfered by approaching the market itself and aimed to gain economies of scale by tendering the contracts together. Hence, the schools were not considered as separate operational units.

5.10 Norway (Kristian Strømsnes, Linda Midtun)[156]

Norway has transposed the 2014 Directives in 2016. The rules concerning the separate operational units are mainly incorporated to the Public Procurement Regulations (*Forskrift om offentlige anskaffelser FOR-2016-08-12-974*) for classical sector.[157] According to the rules applicable to the calculation of contract value (s. 5-4 (3) *Beregning av anskaffelsens anslåtte verdi*), if the contracting authority consists of several units, the total estimated value of all the units will form the basis for the calculation of contract value. This does not apply when a unit is responsible for their procurement or certain categories procurement.

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[154] Commissie van Aanbestedingsexperts 2014, para 6.2.

[155] See Art. 2 (2) of the Decree establishing Commission of Procurement Experts (*Instellingsbesluit Commissie van Aanbestedingsexperts*) Available at: http://wetten.overheid.nl/BWBR0032968/2013-04-01.

[156] This section is based on information received from Kristian Strømsnes and Linda Midtun, PhD candidates in the faculty of law, University of Bergen.

[157] See https://lovdata.no/dokument/LTI/forskrift/2016-08-12-974 (14 October 2016).

In Norway each municipality is normally considered as one and the same contracting authority, unless the municipality has created independent legal persons, such as a stock based company or municipal enterprises. However, under the new rules it is clear that a contracting authority can comprise of several independent units. The new provision and exemption from the main rule of aggregation has not been discussed or reasoned in legislative preparatory memorandums or the draft proposal nor is there any case law concerning the matter.[158] The current rules under the Norwegian Public Procurement Regulations do not provide any guidance on the exact characteristics of such separate operational unit.

5.11 Poland (Piotr Bogdanowicz)[159]

The separate operational units are considered independent under Polish Law. According to the Art. 32 (5) of the Polish Public Procurement Act (*Prawo zamówień publicznych*) of 29 January 2004 where a separate, financially independent organisational unit of the contracting authority awards a contract in connection with its own activities, the value of the awarded contract shall be calculated separately from the value of contracts awarded by other financially independent organisational units of that contracting authority.[160] This provision is not a novelty in Poland as it has entered into force already 10 years prior to the 2014 Directives.

The estimated value of the contract is calculated at a single unit level if the following three conditions of independence are met: 1. organisational unit is separate, 2. organisational unit is financially independent and 3. organisational unit awards a contract in connection with its own activities.

The concept of financial independence of the organizational unit is not defined in the Polish Public Procurement Act. In legal literature it is submitted that the organisational unit is financially independent, when it has the power to determine its own income and expenditure and is responsible for its own development strategies. In practice the independency of a unit is determined and consequently can be verified through different internal rules and regulations of the contracting authority to which it is a part of.

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[158] Norges offentlige utredninger (NOU) 2014:4 and Prop. 51 L (2015–2016).

[159] This section is based on information and analysis received from Dr. Piotr Bogdanowicz, Ph.D. in European Union Law. He is an assistant professor (adiunkt) in European law at the Faculty of Law and Administration, University of Warsaw.

[160] Available in English http://www.oecd.org/poland/39645964.pdf (visited 20 October 2016).

5.12 Portugal (Pedro Telles)[161]

Portugal has not transposed any of the 2014 Procurement Directives. Currently there are no rules under Portuguese law on separate operational units and calculation of estimated contract value depending on the organisational structure of the procurement functions. According to the Art. 17 (6) and (7) of the Portuguese draft proposal for transposition of the Directive 2014/24, when the contracting authority comprises of different operational units, the estimation of the contract value should include the full amount of purchases by the various operating units, unless they are independently responsible for their purchases, particularly because they are responsible for peripheral or municipal services.[162]

In Portugal, there is a high level of overall procurement decentralisation as parishes (more than 2000) have their own financial autonomy in addition to more than 300 municipalities. However, within each contracting authority there is a high level of centralisation. Also within universities, each school or faculty has its own budget and is considered as a separate unit, which conducts its procurement functions independently.

The obligation to use centralized framework agreements and other contracts is subject to the laws establishing each central purchasing body. According to the Art. 260 of Public Contracts Code 2008 (*Código dos contratos públicos, Decreto-Lei no 18/2008, de 29 de janeiro*)[163] central purchasing bodies can be established, but their functions and structure shall be set out by specific regulations. The general law on central purchasing bodies (*Decree Law 39/2007*) establishing the national central purchasing body and sectorial central purchasing bodies mandates the use of the national central purchasing body's framework agreements, when purchasing or leasing any vehicles, for all Portuguese contracting authorities. The use of contracts concluded by sectorial central purchasing bodies' contracts, the one for health care services for example, is not mandatory. Nonetheless, under Art. 3 of Decree Law 39/2007, some contracting authorities, mostly government departments and public institutes, are bound to use the contracts of the national and sectorial central purchasing bodies unless otherwise authorized by the Portuguese Government, while the use is voluntary for all other contracting authorities.

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[161] This section is based on analysis and information received from Dr. Pedro Telles, Senior Lecturer at the Swansea University, UK and the author of tells.com blog and Public Procurement Podcast.

[162] Draft proposal 2016 for a new portuguese Decree Law on public procurement, available in Portuguese at http://www.portugal.gov.pt/media/20858186/20160802-mpi-cpp.pdf (26 October 2016).

[163] Available in Portuguese at: http://www.base.gov.pt/mediaRep/inci//files/base_docs/CCPTextoconsolidadojan2016.pdf (26 October 2016).

5.13 Romania (Ioan Baciu) [164]

In May 2016, Romania adopted four distinct pieces of legislation into which the new public procurement rules of the 2014 Directives were implemented: Law No. 98/2016 on public procurement (*Legea nr.98/2016 privind achiţiile publice*)[165], Law No.99/2016 on utilities procurement (*Lege nr.99/2016 privind achiziţiile sectoriale*)[166], Law No.100/2016 on works concessions and services concessions (*Lege nr.100/2016 privind concesiunile de lucrări şi concesiunile de servicii*)[167] and Law No.101/2016 on the remedies and judicial actions in the matter concerning the award of public procurement contracts, utilities contracts and works and services concession contracts, and for the organization and functioning of the National Council for the Solving of Complaints (*Legea nr. 101/2016 privind remediile şi căile de atac în materie de atribuire a contractelor de achiziţie publică, a contractelor sectoriale şi a contractelor de concesiune de lucrări şi concesiune de servicii, precum şi pentru organizarea şi funcţionarea Consiliului Naţional de Soluţionare a Contestaţiilor*).

When transposing Directive 2014/24, Romania added an additional paragraph which aims to clarify the criteria for "separate operational unit". Thus, Art.10 (3) of Law 98/2016 on public procurement states that an operational unit shall be considered as being independently responsible for its procurement or certain categories thereof if, cumulatively:

1. it carries out, independently, the relevant procurement procedures;
2. it makes, independently, all decisions with regard to its procurement;
3. it has at its disposal financial sources for its procurement which are itemized distinctively in its budget;
4. it concludes, independently, public procurement contracts; and
5. it makes all the payments under the relevant public procurement contracts from the budget it has at its disposal.

In addition, under Art.4 (1) a) of Law 98/2016, contracting authorities are, among others, all central or local public authorities and institutions as well as their constituent structures which have been delegated the power to act as an authorising officer and have been granted the competence to award public contracts.

Consequently, in Romania, all the *constituent structures of a larger authority which meet the conditions (a) to (e) above and have been granted* – by the law setting them up or by the relevant constitutive deeds etc., upon the case, *with specific competences*

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[164] This section is based on the information and analysis of Ioan Baciu, PhD researcher, Center for Good Governance Studies, Babes Bolyai University, Romania, and a member of the European Commission's Stakeholder Expert Group on Public Procurement. Thank you also to professor Dacian Dragos for additional comments.

[165] Available in Romanian at: http://anap.gov.ro/web/wp-content/uploads/2016/05/L98_2016.pdf (24 October 2016)

[166] Available in Romanian at: http://anap.gov.ro/web/wp-content/uploads/2016/05/L99_2016.pdf (24 October 2016)

[167] Available in Romanian at: http://anap.gov.ro/web/wp-content/uploads/2016/05/L100_2016.pdf (24 October 2016)

involving the award and the conclusion of public procurement contracts, fall within the ambit defined by Art.10 (2) and (3) of Law 98/2016, hence may organize and carry out their own procurement, as independent operational units.

These structures have at their disposal a *dedicated budget* which must not only comprise the acquisition of goods, services or works, but also identify the financial resources necessary for their purchasing. As a matter of principle, these budgetary lines must also be reflected in their annual procurement strategy and the relevant annual procurement plans. However, in order for a department within a municipality to be regarded as independent, i.e., to be able to enter into, and deliver public procurement contracts, it must necessarily be given *an independent legal personality*. Such independent "constituent structures" *are however not bodies governed by public law*. In fact, Art. 4 (2) from Law 98/2016 defines the bodies governed by public law as being "entities, *other than those provided by [Art. 4(1) a) of Law 98/2016]*, which […] meet, cumulatively, the following characteristics: (a) are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) have legal personality; and (c) are financed, for the most part, by an authority or an entity falling within the definition offered by [Art. 4(1) a) of Law 98/2016]; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by an authority or an entity falling within the definition offered by [Art. 4(1) a) of Law 98/2016], or by other bodies governed by public law."

A good example of independent operational unit is offered by Law 155/2010 on the local police. According to the cited law, the Romanian local police is organized and functions [in each commune, town, city or district of Bucharest, upon the case] based on the resolution of the decisional authority of the respective local public administration as either a functional division within the dedicated apparatus of the mayor or as a public institution of local interest, with legal personality. The Local Police of the Bucharest Municipality, for example, is organized as an independent institution under the direct subordination of the Bucharest City Hall (being in fact a "Directorate General" thereof) and meets all the conditions itemized above for independent operational units. To this extent, it procures independently goods, services and works, in line with its annually approved budget and procurement plans. The same would go for the Streets Administration Department or the Department for Lakes, Parks and Leisure of the Bucharest Municipality, as well as for the Bucharest Metropolitan Library, etc. On contrary, other Romanian municipalities have decided to organize their local police in the form of an internal structure thereof, which means that they do not have their own budgets, nor have they any decisional powers or competences with regard to the procurement of the needed items, services or works, etc.

5.14 Spain (Albert Sánchez Graells)[168]

Spain has notified the European Commission of some measures regarding transposing 2014/24 Directive, but that has not actually taken place. The transposition has so far covered only few articles of the Directive. As regards to separate operational units and the calculation of estimated contract value, no transposition has taken place. Thus, the Spanish public procurement rules do not set out the criteria for separate operational units nor require that all purchases within a municipality for example should be aggregated as a municipality may comprise of several contracting authorities. It is worth noting that the time of writing (5 December 2016), projects for domestic laws transposing Directives 2014/23, 2014/24 and 2014/25 are being discussed in the Spanish Parliament under an accelerated procedure. The period for the proposal of amendments will conclude on 14 December 2016, which could still allow for the adoption of the new rules by the end of 2016.

The project submitted to Parliament by the Spanish government includes provisions for the transposition of the rules in Art 5(2) Dir 2014/24 concerning public procurement by contracting authorities comprised of separate operational units. This is found in Art 101(2)(6). The first two subparagraphs of this provision are verbatim copies of Art 5(2) Dir 2014/24. However, it is remarkable that the Spanish draft rule also includes a final presumption of autonomous procurement behaviour by the separate operational units whereby "*In all cases, it will be understood that the circumstance referred to in the previous paragraph* [i.e. the separate operational unit is independently responsible for its procurement or certain categories thereof] *occurs when that separate functional unit has specific financing and competencies with respect to the award of the contract*". This can be seen as an attempt to minimise the effects of the new rules in Art 5(2) Dir 2014/24 and to consolidate previous practice, we described below.

In that connection, it is worth noting that, under current Spanish law, a single public authority ("*entidad contratante*" or "*contracting entity*") can have multiple contracting bodies or units ("*órganos de contratación*" or "*contracting authorities*"), and they can be organised in different ways. According to Art. 51 of Royal Legislative Decree 3/2011 of 14 November 2014 adopting the consolidated text of the Law on Public Sector Contracts (*Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público*) the contracting entities may organise or delegate their powers and responsibilities to contracting authorities. The contracting authorities (in Spain these are actually the "units" operating within a contracting entity) are the ones that run the tender procedures, award the contracts and manage the budget. [169] Large municipalities may create these authorities following different criteria in

[168] This section is based on information and analysis received from Dr. Albert Sánchez Graells, Senior Lecturer at the law school of Bristol University. He is also a member of European Commission's Stakeholder Expert Group on Public Procurement and the author of howtocrackanut.com blog on EU economic law.

[169] Available at in Spanish: https://www.boe.es/boe/dias/2011/11/16/pdfs/BOE-A-2011-17887.pdf (27 October 2016).

order to spread work and/or follow rules of representation of different parts of the population in the adoption of decisions of a very local nature. Usually, the creation of those contracting units can be done either by geographical zones or by areas of specialisation and large cities like Madrid combine both criteria. Smaller municipalities do not have the same operational needs and, in those, the division tends to be used to limit the powers of the mayor. There is no clear general criterion on how competences are divided to different actors or when a part of the local budget is allocated from the general municipal budget into a specialised contracting unit, but these decisions are based on the regional administrative regulations or internal by-laws of each contracting entity.

5.15 UK (Luke Butler, Abby Semple)[170]

In the UK the rules of Directive 2014/24 are implemented by the Public Contract Regulations 2015.[171] According to s.6 (3) and (4) of the said regulations where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all those units. However, a separate operational unit is independently responsible for its procurement, or certain categories of its procurement, the values may be estimated at the level of the unit in question.

In the previous Public Procurement Regulations 2006 (superseded by the 2015 Regulations), s. 8 (15), the possibility to make an exemption to the rules of aggregation was recognized. Actually, devolvement of procurement functions to discrete operational units has been recognized in UK for decades. According to the previous regulations, the calculation of a contract value, when the goods or services are required for the sole purposes of a discrete operational unit within the organisation of a contracting authority may be done at the level of the single unit if certain conditions were met.[172] They explain the conditions in more practical terms, the conditions were that: 1) a unit may be regarded as discrete and independent including managerial autonomy regarding its procurement activities; 2) general budget autonomy i.e. the part of the budget allocated to procurement spending must come from the budget over which the unit has control; 3) the goods or

[170] This section is based on information received from Dr. Luke Butler, Lecturer in Law at the University of Bristol Law School and the author of Transatlantic Defence Procurement (Cambridge University Press), forthcoming and from a public procurement specialist Abby Semple having a strong practical experience in delivering procurement project in Ireland, UK and at European level. She is also the author of "A Practical Guide to Public Procurement", Oxford University Press 2015.

[171] Available at: http://www.legislation.gov.uk/uksi/2015/102/contents/made (11 October 2016).

[172] According to the Public Contracts Regulations 2006, 8 (15) "[n]otwithstanding paragraphs (11) and (13), in relation to a public supply contract or a public services contract, when the goods or services are required for the sole purposes of a discrete operational unit within the organisation of a contracting authority and—(a) the decision whether to procure those goods or services has been devolved to such a unit; and (b)that decision is taken independently of any other part of the contracting authority; the valuation methods described in paragraphs (11) and (14) shall be adapted by aggregating only the value of the consideration which was payable or the contracting authority expects to be payable, as the case may be, under a public supply contract or a public services contract which was or is required for the sole purpose of that unit."

services are acquired solely for the purposes of that unit; 4) the decision over whether to purchase has been wholly devolved to the unit; 5) the decision is taken independently of any other part of the contracting authority.

In principle, there is nothing to stop different units or departments of an authority from contracting separately. In the UK, government departments and agencies adopt complex corporate structures. For instance, there are executive agencies, non-departmental public bodies, trading funds etc. This complicates the issue of who is responsible for the budget and therefore who might be considered to be a separate operational unit. However generally, according to Dr. Butler, a major city such as London cannot be considered to be a single contracting authority. Rather, different governmental departments within London might well constitute a contracting authority. In the case of London, there is no single overarching authority which purchases on behalf of all of the local councils.[173] While there are several joint procurement initiatives between functional bodies or between councils, these are seen as being optional - they are not required to aggregate their procurement needs. Each of them are regarded as a contracting authority and responsible for applying EU and national procurement rules as set out in the Public Contracts Regulations 2015.

For departments or units which operate within a single contracting authority, such as a council, the normal practice would be to aggregate requirements which are similar in nature. However, according to *Abby Semple*, this is generally seen as being mandated by administrative convenience and value for money, rather than strictly by law. In many cases, the standing orders or internal procedures of a council or other public body will determine which units are empowered to undertake procurement or to award contracts. *Butler* suggests that in the UK, the units conducting public contract awards have traditionally been very reluctant to give away their operational control and the requirement to aggregate their purchases would be perceived as a demand to give up some of their independence.

[173] The Greater London Authority group i.e. the GLA group performs a relatively limited function in this regard.

6 Conclusions

The purpose of the aggregation rules is to avoid contract-splitting and other actions which aim to circumvent the EU public procurement rules. According to Art. 5 (2) of Directive 2014/24, a contracting authority may be comprised of several operational units. The calculation of contract value can be based at the level of a single unit if justified by objective reasons. These reasons include the requirement of separate budget and independent responsibility for procurement. It is for the separate operational unit and the contracting authority to which the unit is a part of, to establish the existence of such reasons and provide evidence thereto.

Regardless of the new rules on aggregation of purchases in a contracting authority comprising of separate operational units, many ambiguities have remained. First, Procurement Directive 2014/24 defines the authorities whose purchases are covered by the Directive, but does not expressly reply to what is considered as one and the same contracting authority. The division of powers and aggregation rules of different units have often been seen as a matter belonging to the discretion of national law. The interpretation on what is a contracting authority varies across the member states. However, it seems that the general approach in all countries covered in this study is that the purchases of State authorities are not aggregated. At the municipal level, the interpretations vary. For example in France, Spain and the UK, municipalities may be comprised of different contracting authorities whose purchases are not required to be aggregated, whereas in Germany, a municipality is considered as one contracting authority.

It appears that under Swedish law, each municipal committee (*nämnd*) is considered as a contracting authority even though these committees do not have a distinct legal personality and operate merely on behalf of the municipality. Thus, under LOU a municipality or a region may be comprised of several contracting authorities. Regardless of this recent Swedish case law, which considers municipal committees as independent contracting authorities and the new rules on separate operational units, still some ambiguities regarding aggregation rules remain in Sweden. Different and partly contradictory aggregation rules to contracts below and above EU thresholds are creating legal uncertainty on which methods for calculation should be used when determining the contract value under LOU.

Secondly, it is not clear who is the right party in the litigation: the separate operational unit or the contracting authority/legal person it is a part of. The latter finds support in Swedish national procedural and debt collection laws. Legal sanctions are usually imposed only towards natural or legal persons regardless of who is acting as their representative. On the other hand, in the context of public procurement law, the separate operational unit being independently responsible for its procurement procedures would rather be the "right" object for the fine. But even in the event where a separate operational unit is acting independently, it is formally acting on behalf of a contracting authority and the legal person it is a part of.

Thirdly, repeated infringements are considered as aggravating circumstances when determining the amount of procurement infringement fines under LOU. The fines cannot exceed 10 percent of the contract value. Regardless of the wording of s. 4, Chapter 21 of LOU on fines with explicit reference to the rules on aggregation and calculation of contract value, the aggregation of purchases has not been reflected in the amount of fines in Swedish case law. So far the aggregation rules have only been applied by the courts when determining whether the aggregated contract value falls under the scope of LOU.

It is likely that the rules on separate operational units will create new legal dilemmas when courts have to address the potential aggravation of fines. For example, if a court finds several units within the same contracting authority not meeting the independence criteria of separate operational units but those units have assumed so, the direct awards of such units become repeated illegal direct purchases of the contracting authority to which they are a part of. On the other hand if units are in fact independent, it is likely that the severity of consequences for infringement of a unit would not be subject to breaches by other independent units. The case *Förvaltningsrätten i Stockholm mål nr 24947-15* (not final, appeal pending) supports such interpretation even though the case concerned different contracting authorities operating under the same legal personality instead of separate operational units. The Administrative Court of Stockholm established that a fine for an infringement of a municipal committee (*nämnd*) cannot be aggravated due to an earlier direct award of another committee operating within the same municipality.

Check-list for establishing the independence of a separate operational unit

The purchases of independent units shall be aggregated unless for objective reasons, the contract value can be based at the level of a single unit. This study has covered several aspects that can be taken into account when determining the independence of a unit. From these elements a non-exhaustive and indicative check-list has been derived in order to facilitate the evaluation of a unit's status. In deciding whether or not certain units can be treated as separate operational units, a case-by-case assessment is required. The unit's status is subject to the categories of works, supplies or services acquired as well as the value of the contract itself.

This study identifies six key elements which can be of importance when determining, whether the contract value can be estimated at the level of a separate unit or, whether all purchases of units within the same contracting authority should be aggregated.

1) Separate budget line which is managed by the unit itself and from which the procured items are paid from

Different contracting units have different practices to grant budgets and to delegate managing powers. For example, in some municipalities the budget lines are assigned only to the level of municipal committees or departments where as in others, each school may have independent budgets managed by the principal or the school board.

2) The unit runs the tender procedure independently

The unit is required to have the resources and competence to run procurement procedures independently. To determine whether the tender procedure has been run independently, attention should be paid, among others, to the following details:

- Is the unit required to seek pre-approval from another part of the contracting authority before initiating the tender procedure or before concluding a contract?
- Are persons responsible for the procurement working within the unit in question?
- Are the external consultants involved in the procurement acquired on the initiative and funds of the unit?

3) Competence to make buying decisions and to conclude contracts on behalf of the contracting authority

Does the public official or managing body in charge of the unit have powers to make decisions equivalent of the contract value in question? Especially at the municipal and regional sector, the powers to make buying decisions delegated to units or the public officials in charge of those units are usually limited to a certain amount of money. Thus, it is of importance to establish whether the value of the procurement falls within the decision making powers of the unit.

4) Is any other part of contracting authority interfering or affecting the contract between the unit and its contractor?

If a contracting authority is trying to exploit its overall position as a major purchaser i.e. the prices or terms of contract of a unit are negotiated by the contracting authority, the unit may not be acting as independently as it is required in order to rely on the exemption to the aggregation rules. A unit's independency may be compromised also if its purchase prices are tied to major purchaser discounts of the contracting authority.

5) Will other units of the same contracting authority purchase through the contract awarded by the unit?

If other units of the contracting authority will purchase through a contract awarded by a unit within the contracting authority, the value of the contract cannot be estimated solely at the level of each unit.

6) Obligation to purchase through centralized framework agreements or contracts

If a contracting authority is required to use certain framework agreements or contracts concluded by a central purchasing body or centralized procurement function of the authority itself, such obligation usually covers all the units within the same contracting authority. Often different procurement strategies, internal decisions or regulations require that certain categories of products and services are purchased through centralized arrangements of the contracting authority. Some of these are binding by-laws, but some are mere recommendations. An unit may be considered independent and separate in relation to certain works, supplies and services, whereas regarding some other supplies or services obliged to use centralized contracts of contracting authority and subject to aggregation rules.

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