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

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1. INTRODUCTION

1.1 Purpose and Structure of this Article

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

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dish Perspective. It builds on the excellent book on "Public Procurement and the EU Competition Rules" published by Albert Sánchez Graells in 2011.

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

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

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

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

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

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

[1] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Oxford and Portland, Oregon, Hart Publishing, 2011), p. 9.

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

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

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

The timing for suggesting amendments to the Swedish Public Procurement Act has been carefully chosen. Firstly, a new EU Directive on Public Procurement is to be adopted soon. Secondly, following the adoption of the new EU Directive on Public Procurement, the Swedish Public Procurement Committee (in Swedish language: "Upphandlingsutredningen")[2] is to evaluate national Swedish procurement legislation and to propose amendments to the Swedish Public Procurement Act, with a view to obtain more value for money in Swedish public procurement.[3] As pro-competitive public procurement is the key to

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

[3] According to its webpage, the Committee has the following mission: "The Public Procurement Committee is to evaluate the procurement rules from an economic and social policy perspective. The aim is to investigate if the procurement rules adequately allow for the con-

obtain more value for money in public procurement, the present article on public procurement and competition law from a Swedish perspective should therefore be timely, in particular as to its proposals for legislative amendments aiming at better interaction between public procurement and competition law. However, the target group for this article does not only consist of Swedish public procurement lawyers, Swedish competition lawyers and the general Swedish public. The article is also designed to appeal to international readers who would like to get an overview over current Swedish case law in public procurement. This is one reason why this article has been written in English.[4] For the benefits of international readers, section 1.2 of this article contains a brief introduction to Swedish Public Procurement and Competition Law, which can be skipped by Swedish readers.

This article is the last in a series of articles related to public procurement and anti-competitive information exchange,[5] which, taken together, shall be presented as the author's licentiate thesis in competition and public procurement law at the University of Lund in early 2013. Certain aspects of the present article will be developed in-depth in my doctoral thesis due to be presented at the University in Lund in 2014. Any comments and suggestions will therefore be very much appreciated and taken into account when preparing the final doctoral thesis.[6]

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tracting authorities and entities to make good economic business by using the competition in the market as well as using its buying power to improve the environment, taking social and ethical considerations, and provide for increased business opportunities for small and medium-sized businesses. The work of the Committee should form the basis for necessary legislative amendments. The Committee may also propose other necessary measures in the field of public procurement."

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

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

6 The author welcomes comments and suggestions related to this article on robert.molden@garde.se.

1.2 Introduction to Swedish Public Procurement and Competition Law

Swedish public procurement in the classical sector is governed by the Swedish Public Procurement Act which entered into force in 2008. In this article, the Act will be referred to as **LOU** which is the established Swedish abbreviation for "Lag (2007:1091) om offentlig upphandling".[7] LOU implements Directive 2004/18/EC concerning the coordination of award procedures in the classical sector.[8] In this article, this Directive will be referred to as the **Classical Sector Directive**.

Swedish public procurement in the utilities sector is governed by the Swedish Procurement Act in the Areas of Water, Energy, Transports and Postal Services. In this article, the Act will be referred to as **LUF**, which is the established Swedish abbreviation for "Lag (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster". LUF implements Directive 2004/17/EC coordinating the procurement procedures in the utilities sector.[9] In this article, this Directive will be referred to as the **Utilities Sector Directive**.

Swedish competition law is governed by the Swedish Competition Act of 2008[10] containing provisions prohibiting anti-competitive agreements and abuse of a dominant position, which constitute copies of Articles 101 and 102 TFEU. According to the *travaux préparatoires* behind the preceding Competition Act,[11] the fact that the substantive provisions of the Swedish Competition Act are in line with those of EU competition law means that the Commission's

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7 The Swedish Competition Authority has published an introduction to LOU in English *(The Swedish Competition Rules – an introduction)*, which can be downloaded under: http://www.kkv.se/t/IFramePage____1687.aspx. The leading Swedish introductory textbook in the field of public procurement law is Kristian Pedersen, *Upphandlingens grunder* (Jure Förlag AB, second edition, 2011). The leading handbook is Jan-Erik Falk, *Lag om offentlig upphandling – en kommentar* (Jure Förlag AB, second edition, 2011. For a recent handbook in English on EU and Danish public procurement law, see Sune Troels Poulsen, Peter Stig Jakobsen and Simon Evers Kalsmose-Hjelmborg, *EU Public Procurement Law* (DJØF Publishing, second edition, 2012).

8 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

9 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

10 Konkurrenslagen (2008:579). The Swedish Competition Authority has published an introduction to the Swedish Competition Law in English *(The Swedish Competition Rules – an introduction)*, which can be downloaded under: http://www.kkv.se/t/IFramePage____1687.aspx. The leading Swedish introductory textbook in the field of competition law is Leif Gustafsson and Jacob Westin, *Svensk konkurrensrätt* (Norstedts Juridik AB, third edition, 2010). The leading handbook is Carl Wetter, Johan Karlsson and Marie Östman, *Konkurrensrätt en kommentar* (Thomson Reuters, fourth edition, 2009.

11 The Swedish Competition Act of 1993, Konkurrenslagen (1993:20).

practice and jurisprudence of the Court of Justice can serve as guidance when interpreting the Swedish Competition Act.[12]

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

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

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

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

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

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12 See prop. 1992/93:56, p. 21.

13 Judgment of the Swedish Supreme Court in Case T 2808-05 of 19 February 2008, *The Ystad Harbour Case*.

14 In September 2007, the enforcement activities of the Swedish National Board for Public Procurement (Nämnden för offentlig upphandling – NOU) were transferred to the Swedish Competition Authority.

15 Chapter 3, Articles 1 and 3 of the Swedish Competition Act.

16 Chapter 3, Article 1 and Chapter 6, Article 1 of the Swedish Competition Act.

17 Chapter 3, Article 4 and Chapter 6, Article 1 (2) of the Swedish Competition Act.

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

19 Marknadsdomstolen, www.marknadsdomstolen.se; see Chapter 7, Article 1 of the Swedish Competition Act.

"*Chapter 2, Article 1*
Agreements between undertakings shall be prohibited if they have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent, if not otherwise regulated in this act. This shall apply, in particular, to agreements which:
1. directly or indirectly fix purchase or selling prices or any other trading conditions;
…'"

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

2.1 Case Law on Public Procurement and Bid-rigging Cartels

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

"*LOU Chapter 1, Article 11*
Groups of suppliers are entitled to apply to be allowed to submit a tender and to submit a tender. The contracting authority may not impose conditions requiring these groups to assume a specific legal form in order to be allowed to submit a request to participate or a tender."[20] (emphasis added)

"*LOU Chapter 11, Article 12*
A supplier may, where appropriate and for a particular contract, rely on the economic, technical and professional abilities of other undertakings. The supplier shall prove that the supplier will have at its disposal the resources necessary for the execution of the contract by producing a commitment from the undertakings in question or in some other way."[21] (emphasis added)

According to LOU, it is thus legal (i.e. not contrary to public procurement law) to submit joint tenders together with your competitors or to team up with your competitors as sub-contractors. However, such joint actions could be regarded as a bid-rigging cartel by the Swedish Competition Authority under Chapter 2, Article 1 of the Swedish Competition Act, with fines imposed up to 10 % of the co-operating companies' turnover.

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

[20] This Article implements Article 4 (2) of the Classical Sector Directive.
[21] This Article implements Article 48 (3) of the Classical Sector Directive.

approach against bid-rigging even when effectuated openly or among small and medium-sized enterprises (SMEs).

2.1.1 The Asphalt Case of 2009 – Swedish Market Court[22]

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

> "The present case concerns cooperation related to public procurement. The essence of a public procurement proceeding is that the contracting authority, in reply to its contract specifications, expects offers from a number of tenderers which are independent from each other. The intention is thus that the tenderers submit offers which are not the result of any cooperation with competitors in order to enable the contracting authority to choose a so cost-effective tender as possible. To the extent that tenders have been preceded by contacts between competitors, the competitive situation will be affected compared to the situation which otherwise would have been at hand.
>
> A public procurement proceeding is thus supposed to lead to competition between the tenderers. That potential tenderers prepare and submit tenders independently of each other is thus an important part of the system. Tenders which are submitted as a result of cooperation reduce uncertainty of the outcome and very probably affect the competitive situation. …
>
> Agreements made by market participants in view of a public procurement proceeding as to who shall win the contract and as to the level of the tenders to be submitted must be regarded as having the object to prevent, limit or distort competition. The same applies to agreements as to market partition or limitation of production."[23]

2.1.2 The Power Supply Poles Case of 2009 – SCA[24]

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

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[22] Judgment of the Swedish Market Court in Case MD 2009:11, of 28 May 2009.
[23] Judgment of the Swedish Market Court in Case MD 2009:11 of 28 May 2009, p. 87–88.
[24] Fine order of the SCA in Case 237/2007 of 30 June 2009.

seven different public procurement proceedings regarding power supply poles made of wood. In particular, they had agreed that the undertaking losing the public procurement contract would supply half of the contract's value to the winning undertaking as a sub-contractor. This bid-rigging was found to infringe competition law and a non-mandatory fine order was proposed to Rundvirke Poles AB at the amount of 2 million SEK. Rundvirke Poles AB accepted this fine and thus avoided court proceedings by ways of settlement. This case was the first time a non-mandatory fine order was proposed by the Swedish Competition Authority.[25] The fine proposed to Rundvirke Poles AB was considerably reduced due to its active cooperation in the investigation.

2.1.3 The Transport of Deceased Case of 2010 – SCA[26]

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

2.1.4 The Burnt Waste Transport Case of 2011 – SCA[27]

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

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

[26] Fine order of the SCA in Case 20/2009 of 2 July 2010.

[27] Fine order of the Swedish Competition Authority in Case 327/2010, of 1 December 2011.

petition law. The total value of sales in the relevant market for ASFAB was approximately 587 000 SEK and the fine was set at 293 000 SEK. The value of sales on the relevant market for Björn Hägglunds Maskiner AB was approximately 351 000 SEK and the fine was set at 175 000 SEK. The undertakings accepted the non-mandatory fine order and thus avoided court procedures.

2.1.5 The Tyre Case of 2010 – SCA[28]

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

This case has not yet been decided by the Stockholm District Court.[29] Of particular interest in this case, is the attitude taken by the Swedish Competition Authority as to the two undertakings capacity to submit independent tenderers. The Authority states the following in its plaint:

> "Däckia and Euromaster have stated that they lacked capacity to submit own tenders in public procurement proceedings as they did not have service stations in all those places where participating contracting authorities had activities.
>
> Horizontal cooperation between undertakings which cannot carry out the project or activity related to the agreement on their own are outside of the scope of Chapter 2, Article 1 of the Swedish Competition Act. A condition for such an agreement to be outside the scope of Chapter 2, Article 1 of the Swedish Competition Act is that the undertakings do not have the possibility to submit tenders on parts of the procurement and that the cooperation does not extend to more undertakings than is necessary for the provision of services to be possible."[30]

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

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

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[28] Plaint filed by the Swedish Competition Authority in Case 605/2010 on 24 November 2010.

[29] However, in its judgment of 22 August 2012 in Case MD 2012:9, the Swedish Market Court has found that the alleged infringements are not time-barred.

[30] Plaint to the Stockholm District Court submitted by the Swedish Competition Authority in Case 605/2010 on 24 November 2010.

> "A commercialization agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the co-operation, for example, because of the costs involved. **A specific application of this principle would be consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually.** As the parties to the consortia arrangement are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1)."[31] (emphasis added)

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

The provisions in the LOU which explicitly stipulate that tenderers are entitled to submit joint tenders[32] or to assign each other as sub-contractors[33] are misleading as the uninformed reader is made to believe that the provisions take precedence over potential competition law issues in this respect.

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

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

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[31] Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, published on 14 January 2011 in the Official Journal of the EU, C 11/1.

[32] LOU Chapter 1, Article 11.

[33] LOU Chapter 11, Article 12.

2.3 Public Procurement and Anti-competitive Information Exchange

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

In early 2011, the European Commission published its new Guidelines on horizontal co-operation agreements containing a new chapter on information exchange between competitors.[34] As we will see below, the issue of anti-competitive information exchange is particularly relevant in the area of public procurement.

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

> "The purpose of this chapter is to guide the competitive assessment of information exchange. Information exchange can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organisation or through the companies' suppliers or retailers.
>
> Information exchange takes place in different contexts. There are agreements, decisions by associations of undertakings, or concerted practices under which information is exchanged, where the main economic function lies in the exchange of information itself. Moreover, information exchange can be part of another type of horizontal co-operation agreement (for example, the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges should be carried out in the context of the assessment of the horizontal co-operation agreement itself.
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> Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries, thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other's best practices. Sharing of information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.
>
> However, the exchange of market information may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination.

[34] Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines).

> Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel."[35]

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

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

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

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

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

the contracting authority on the price offered by the winning tenderer. This is one reason why cartels are easier to organise and therefore probably more likely to occur in relation to public procurement proceedings than on the market in general.

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

> "A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour. For example, mere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data."[37]

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

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

[37] Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines), para. 62.

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

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

2.4 Public Procurement and the Protection of Sensitive Information

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

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

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

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

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

[39] Chapter 2 Article 1 of the Swedish Freedom of the Press Act.

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

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

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

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

Once an award decision has been taken, the information submitted by a tenderer is protected by two alternative provisions of OSL. If the contracting authority is a company owned by a municipality or county, secrecy applies to information concerning an undertaking's business or activities if it can be assumed that the undertaking would be harmed if the information is revealed.[40] If the contracting authority is a central Government authority, a municipality or a county, secrecy applies if there is a particular reason to assume that the undertaking would be hurt if the information is revealed.[41]

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

2.4.1.1 The Varec Case of 2008 – CJEU[42]

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

[40] OSL Chapter 31 Article 17.
[41] OSL Chapter 31 Article 16.
[42] Judgment of the CJEU in Case C-450/06, *Varec SA* v *État belge*, of 14 February 2008.

in public procurement proceedings. The main issue at hand was whether or not the review body could assess confidential information relied upon by one party, without giving access to this information to the other party.[43] The CJEU stated that the "principal objective of the Community rules in [the field of public procurement law] is the opening-up of public procurement to undistorted competition in all the Member States".[44] The CJEU went on stating that "in order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an on-going procurement procedure or in subsequent procedures."[45] The CJEU concluded that the national court was entitled to assess confidential information without giving the other party access to the information, as the CJEU found that the right to access information in judicial proceedings shall be balanced against the right of third parties to protect their confidential business secrets in order to maintain, among other things, fair competition within the field of public procurement.

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

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

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[43] For an in-depth analysis of this case and other related judgments of the CFEU, see Grith Skovgaard Olykke, "How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?" (2011) 6 Public Procurement Law Review p. 179–192. See also Andrea Sundstrand, "Sekretessen för företagshemligheter i offentlig upphandling – referat med expertanalys", published on www.jpinfonet.se on 18 August 2008.

[44] Judgment of the CJEU in Case C-450/06, *Varec SA* v *État belge*, of 14 February 2008, para. 34.

[45] Judgment of the CJEU in Case C-450/06, *Varec SA* v *État belge*, of 14 February 2008, para. 35.

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

2.4.2.1 The Vägverket Case of 2007 – Supreme Administrative Court[46]

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

2.4.2.2 The Banverket Case of 2008 – Sundsvall Administrative Court of Appeal[47]

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

2.4.2.3 The Mjölby Kommun Case of 2008 – Jönköping Administrative Court of Appeal[48]

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

[46] Judgment of the Supreme Administrative Court in Case 4753-06, *Peab Asfalt AB*, of 30 October 2007.

[47] Judgment of the Sundsvall Administrative Court of Appeal in Case 2831-08, *Atkins Sverige AB*, of 4 November 2008.

[48] Judgment of the Jönköping Administrative Court of Appeal in Case 3025-08, *Ingemar Järpsten*, of 3 December 2008.

part of the tenderer's business secrets. If disclosed, the list could be used at later procurements and therefore harm the bidder.

2.4.2.4 The Försvarets Materielverk Case of 2012 – Stockholm Administrative Court of Appeal[49]

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

2.4.2.5 The Västtrafik AB Case of 2012 – Jönköping Administrative Court of Appeal[50]

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

2.4.2.6 The Skånetrafiken Case of 2012 – Göteborg Administrative Court of Appeal[51]

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

[49] Judgment of the Stockholm Administrative Court of Appeal in Case 6701-11, *TeliaSonera AB*, of 2 January 2012.
[50] Judgment of the Jönköping Administrative Court of Appeal in Case 1076-12, *Fredrik Schyllander*, of 19 April 2012.
[51] Judgment of the Göteborg Administrative Court of Appeal in Case 5310-12, of 11 July 2012.

information regarding, e.g., time schedules and quality plans from the other tenderers in order to evaluate the scores given to each of the tenderers during the evaluation. Skånetrafiken refused access to these documents and claimed that the documents contained information of such a nature that the undertakings concerned could be hurt if the information was to be handed over. The decision of Skånetrafiken to deny access to the information was upheld by the Göteborg Administrative Court of Appeal.

2.4.2.7 The Sigtuna Kommun Case of 2012 – Stockholm Administrative Court of Appeal[52]

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

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

2.4.3.1 The Arbetsförmedlingen Case of 2009 – Stockholm Administrative Court of Appeal[53]

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

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[52] Judgment of the Stockholm Administrative Court of Appeal in Case 3214-12, *Svenska Väg AB*, of 20 August 2012.

[53] Judgment of the Stockholm Administrative Court of Appeal in Case 7379-09, *Manpower AB*, of 18 November 2009.

2.4.3.2 The Familjebostäder Case of 2010 – Göteborg Administrative Court of Appeal[54]

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

2.4.3.3 The Västtrafik AB Case of 2011 – Jönköping Administrative Court of Appeal[55]

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

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

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

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[54] Judgment of the Göteborg Administrative Court of Appeal of Göteborg in Case 1577-10, *Ingemar Nyman* and *Johan Dahlsjö*, of 12 July 2010.

[55] Judgment of the Jönköping Administrative Court of Appeal in Case 3702-11, *Buss i Väst AB*, of 30 December 2011.

3. FRAMEWORK AGREEMENTS AND COMPETITION ASPECTS

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

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

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

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

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

3.2 Too Long Framework Agreements

3.2.1 Swedish and EU law on too long framework agreements

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

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

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

3.2.2 Swedish case law on too long framework agreements

3.2.2.1 The Vaccination Case of 2011 – Stockholm Administrative Court of Appeal[56]

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

[56] Judgment of the Stockholm Administrative Court of Appeal in Case 5609–5629-10, *Sanofi Pasteur MSD S.N.C.* v *Stockholms läns landsting and Others*, of 23 March 2011.

agreement would thus be 4 years and six months, i.e. six months longer than the four years stipulated in LOU Chapter 5, Article 3. The Stockholm Administrative Court of Appeal found that the counties had not shown any special reasons related to the object of the agreement for applying a duration of more than four years. Potential health hazards related to the absence of contract during a renewed public procurement proceeding should not be considered, as such reasons do not relate to the object of the framework agreement. As to the effects on competition of too long framework agreements, the Court found that "**the longer duration may limit competition on the market in question in an undue way and that the claimant therefore could suffer harm**."[57] On these grounds, the Court decided that the public procurement proceeding should be redone.

3.2.2.2 The Insurance Case of 2011 – Karlstad Administrative Court[58]

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

3.2.2.3 The SharePoint Case of 2012 – Malmö Administrative Court[59]

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

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[57] Page 12 of the judgment.

[58] Judgment of the Karlstad Administrative Court in Case 2873-11 E, KPA Pensionsservice AB v Filipstad kommun and Kristinehamn kommun, of 1 September 2011. The judgment was appealed to the Göteborg Administrative Court, which rejected the appeal on procedural grounds (Judgment of the Göteborg Administrative Court of Appeal in Case 6427-11, *Livförsäkringaktiebolaget Skandia* and *Skandikon Administration AB* v *Filipstads kommun*, of 9 November 2011).

[59] Judgment of the Malmö Administrative Court in Case 3065-12 E, *Bouvet Syd AB* v *VA SYD*, of 4 May 2012.

assessing framework agreements with long duration under LUF. The Court then stated the following:

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

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

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

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

3.3 Too Large Framework Agreements

3.3.1 Swedish and EU law on too large framework agreements

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

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

[60] Page 7 of the judgment.

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

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

The *travaux préparatoires* states the following:

> "According to Article 32 (2), contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. This does not refer to the contracting authority's intention as to the use of framework agreements, but to the effects which can be stated. **The contracting authority therefore must consider how to design a framework agreement in order to obtain competition. For this reason it may, for example, be inappropriate to sign joint framework agreements with few suppliers on behalf of all contracting authorities, as this can lead to the creation of a situation comparable to a monopoly**."[61] (author's translation, emphasis added)

In the draft legislation sent to the Swedish Council on Legislation (Lagrådet), there was an explicit provision implementing the provisions of Article 32 (2) of the Directive as to the duty not to restrict competition. However, the Swedish Council on Legislation considered such a provision to be superfluous, as it considered that the duty not to restrict competition in relation to framework agreements already follows from the general principles of public procurement listed in LOU Chapter 1, Article 9.[62] In view of the Council's opinion, the Swedish legislator decided not to include any explicit provision concerning provisions of Article 32 (2) of the Directive as to the duty not to restrict competition. However, it clearly follows from the *travaux préparatoires* that the Swedish legislator intended to give full effect to these provisions.

3.3.2 Central purchasing bodies in Sweden

One reason why large framework agreements are relatively common in Sweden is that, to a large extent, central purchasing bodies are used by contracting authorities for joint procurement proceedings.[63]

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[61] Prop 2006/07:128, p. 172.

[62] Prop 2006/07:128, p. 333.

[63] For an overview over central purchasing authorities in the EU, see the OECD (2007) study on "Central Public Procurement Structures and Capacity in Member States of the European Union", *Sigma Papers*, No. 40, OECD. Publishing. See also the Evaluation Report on the Impact and Effectiveness of EU Public Procurement Legislation, Part 1, published by the European Commission on 27 June 2011, SEC(2011) 853 final, p. 99 ff.

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

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

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

Government authorities are requested to use a specific central purchasing body, the Statens inköpscentral at Kammarkollegiet,[64] for procurements to the extent stipulated by Articles 2–4 in the Swedish Decree on Co-ordination of Purchases by Government Authorities:[65]

> "For goods and services which Government authorities procure often, in large quantities or which amount to high values, there shall be framework agreements or other joint agreements in place in order to render procurement more effective. In this respect, the possibility of small and medium-sized enterprises to participate in the public procurement proceedings shall be taken into account.
>
> A Government authority shall use such agreements referred to in Article 2 if the authority does not find that another form of agreement is better overall.
>
> Kammarkollegiet shall work for such agreements referred to in Article 2 to be entered into. If a Government authority intends to procure without using those agreements referred to in Article 2, it shall inform Kammarkollegiet of the reasons for this."

The Swedish Association of Local Authorities and Regions (Sveriges kommuner och landsting, SKL) operate a central purchasing body called SKL Kommentus Inköpscentral AB.[66] All of Sweden's 290 municipalities and 20 counties may use this central purchasing body instead of conducting a public procurement proceeding on their own. However, as opposed to Government authorities, there are no legal provisions requiring municipalities and counties to use this central purchasing body. It is also common that municipalities conduct joint procurement proceedings together with one or more other neighbouring municipalities. For example, the central purchasing body of the City of Göteborg, Göteborgs stads upphandlingsbolag, also offers its procurement services to certain neighbouring municipalities.[67]

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[64] www.avropa.se is the website of Statens inköpscentral at Kammarkollegiet.
[65] Förordning (1998:796) om statlig inköpssamordning.
[66] www.sklkommentus.se/inkopscentral is the website of SKL Kommentus inköpscentral.
[67] www.uhb.goteborg.se is the homepage of Göteborgs stads upphandlingsbolag.

3.4 Case Law on Too Large Framework Agreements

3.4.1 The Children Dental Care Case of 1999 – Supreme Administrative Court[68]

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

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

On these grounds, the Swedish Supreme Administrative Court decided that the public procurement proceeding had to be redone.[70]

3.4.2 The Nursing Home Case of 2009 – Göteborg Administrative Court of Appeal[71]

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

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[68] Judgment of the Supreme Administrative Court in Case 1999, RÅ not 1, *Kronobergs läns landsting* v *Anders Englund Tandläkarpraktik AB*, of 12 January 1999.

[69] Chapter 1, Article 4, first paragraph, of the former Swedish Public Procurement Act, Lag (1992:1528) om offentlig upphandling, stipulated as follows: "Procurement proceedings shall be conducted in a way which makes use of the existing possibilities for competition and in a businesslike way."

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

[71] Judgment of the Göteborg Administrative Court of Appeal in Case 6411-08, *Björkviks Vårdhem AB* v *Kommunförbundet Skåne*, of 7 April 2009. The author of this article worked at that time as Associated Judge at the Göteborg Administrative Court of Appeal and served as one of three judges giving judgment in this case.

ment Act (LOU), because of the very wide geographic area to be covered by the framework agreement, which, according to Björkviks Vårdhem AB, would lead to less competition in the long run. The Göteborg Administrative Court of Appeal stated the following:

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

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

3.4.3 The Skåne Postal Services Case of 2011 – Göteborg Administrative Court of Appeal[73]

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

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

[73] Judgment of the Göteborg Administrative Court of Appeal in Case 3952-10, *Kommunförbundet Skåne* v *Bring CityMail Sweden AB*, of 24 January 2011.

principle of proportionality. The Göteborg Administrative Court of Appeal in this respect upheld the prior judgment by the Administrative District Court of Malmö.[74] The Malmö Administrative District Court had stated that in order to be in line with the principle of proportionality the public authority has to clearly state, when setting requirements, why a certain requirement is necessary to fulfil the purpose of the public procurement contract. The Malmö Administrative Court also stated that the contracting authority has to bear in mind that it has to utilize competition as far as possible so that the range of potential tenderers is not decreased more than necessary.[75]

3.4.4 The SKL Kommentus Printer and Copying Machines Case of 2012 – Legal opinion of the Swedish Competition Authority[76]

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

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[74] Judgment of the Administrative Court of Malmö in Case 9491-10 of 23 July 2010.

[75] For an in-depth analysis of this case, see Carl Bokwall and Per-Owe Arvwedson, "Konkurrensbegränsande ramavtal, med särskild inriktning på postmarknaden – analys", published on www.jpinfonet.se on 9 February 2011. The authors acted as attorneys to Bring Citymail AB.

[76] Legal opinion of the Swedish Competition Authority of 30 May 2012, ref. 285/2012, requested by the Stockholm Administrative Court in Case 1857-12, *Toshiba TEC Nordic AB* v *SKL Kommentus Inköpscentral AB*. This excellent legal opinion was drafted by Legal Counsellor Daniel Johansson and adopted by the director general of the Swedish Competition Authority, Dan Sjöblom.

[77] The case number at the Stockholm Administrative Court is 1857-12. At the time this article was finalised, the Court had not yet delivered its judgment.

[78] Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, para. 54.

The legal opinion of the Swedish Competition Authority contains the following very interesting general analysis on the duty not to restrict competition under Article 32 (2) of the Classical Sector Directive:

> "The Swedish Competition Authority considers that the general clause contained in Article 32 (2) fifth subparagraph of the Classical Sector Directive according to which framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition, can be regarded as counterweight to the risks of adverse effects on competition which framework agreements under certain circumstances normally can entail. The existence of the general clause can be regarded as a way to highlight the importance to respect the general principles when conduction public procurement proceedings by way of framework agreements.
>
> However, the Swedish Competition Authority does not share the view of the Swedish Council on Legislation and the Swedish Government that the general clause in Article 32 (2) fifth subparagraph *only* states what is already stipulated by the general principles of public procurement in LOU Chapter 1, Article 9.
>
> The Swedish Competition Authority considers that the general clause in Article 32 (2) fifth subparagraph instead should be interpreted in a way – which goes beyond what is already stipulated by the general principles of public procurement law – by imposing *other* and *more far-reaching* obligations as to the actions of contracting authorities related to public procurement proceedings by way of framework agreements. That the EU legislator has prescribed such an order is in line with the inherent risks of adverse effects on competition which procurements by way of framework agreements under certain circumstances normally can entail.
>
> For example, very large framework agreements which – without any objectively acceptable reasons – exclude other suppliers or which can seriously harm competition through suppliers not being awarded a contract risk to vanish from the market in question, could be subject to intervention by administrative courts of appeal under Article 32 (2) fifth subparagraph of the Classical Sector Directive even if the general principles of public procurement under LOU Chapter 1, Article 9 have not been infringed. In such a case it may be necessary for the court to give direct effect to the general clause in Article 32 (2) fifth subparagraph of the Classical Sector Directive, because it has not been implemented into LOU and LOU lacks provisions which can be interpreted in accordance with the wording and purpose of the general clause."[79]

The circumstances discussed by the Swedish Competition Authority – risk for adverse effects on competition in the long run caused by suppliers not being awarded a contract having to exit from the market – may have been present in the Nursing Home Case of 2009 mentioned above.[80] Here, the Göteborg Administrative Court of Appeal, in view of the author (who served as one of

[79] Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, paras 33–36.

[80] Judgment of the Göteborg Administrative Court of Appeal in Case 6411-08, *Björkviks Vårdhem AB* v *Kommunförbundet Skåne*, of 7 April 2009. The author of this article worked at that time as Associated Judge at the Göteborg Administrative Court of Appeal and served as one of three judges giving judgment in this case.

three judges in the case), rightly found that none of the general principles referred to in LOU Chapter 1, Article 9 impose any obligation on a contracting authority to consider such *long-run* effects on competition which may materialise after a given framework agreement comes to an end. Moreover, it is not astonishing that the Göteborg Administrative Court of Appeal refrained from discussing whether to give direct effect to Article 32 (2) fifth subparagraph of the Classical Sector Directive and to consider whether the potential long-run anti-competitive effects were contrary to that provision. One reason for this is that the Swedish Public Procurement Act is generally perceived as compatible with the Classical Sector Directive in the Swedish judicial community. In practice, it will therefore normally take a precedent judgment from the Swedish Supreme Administrative Court or a legal opinion from the Swedish Competition Authority – such as in the present case – before Swedish administrative courts start applying provisions which are not in line with the Swedish Public Procurement Act, by way of giving direct effects to provisions in the directives.

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

> "As a result of the framework agreement, competition for a potentially very large part of the entire public sector's purchases of printers and photocopying machines as well as related services take place at a single occasion, instead of market participants are given the possibility to compete for supplies at different times during these four years.
>
> Moreover, as to goods and services covered by the framework agreement, only orders concerning exactly those products and services can be placed, and only in the way stipulated in the framework agreement; these will exclude alternative products, designs and solutions which could have met the needs of the contracting authorities as well or better. This leads to a situation where the suppliers' incentives to create innovative solutions, better processes and better quality will be diminished.
>
> The very large amount of *uncertain* authorities entitled to place orders based on the framework agreement in the second annex (1 077 authorities) as compared to the number of authorities entitled to place order (70 authorities) makes it difficult for many suppliers – in particular small and medium-sized – to even calculate reasonable tender prices and to plan which resources are needed in order to deliver the amounts which subsequently may be ordered.
>
> In conclusion, the Swedish Competition Authority considers, in view of what has been stated in paragraphs 57–59 above, that the public procurement proceeding by way of framework agreement conducted by SKL Kommentus Inköpscentral AB risks to be improper or to prevent, restrict or distort competition and therefore to be incompatible with the general clause in Article 32 (2) fifth subparagraph of the Classical Sector Directive."[81]

[81] Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, paras 57–60.

3.5 Proposal to Amend the Swedish Public Procurement Act Highlighting the Duty Not to Restrict Competition, in Particular by Means of Too Large Framework Agreements

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

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

The adverse effects of too large framework agreements have been described very well in an opinion written by Företagarna[83] as follows:

> "Företagarna considers that the design of framework agreements has large consequences as to the possibilities of small undertakings to compete for contracts with the public sector. We have a large, and apparently growing, use of procurement by means of joint framework agreements in Sweden. Procurement by means of joint framework agreements normally involves large contracts with a duration of several years. Of particular importance in this respect is the coordination of purchases among Government authorities. Large joint framework agreements risk making it impossible for small undertakings to participate, because they for obvious reasons often face difficulties to compete if there are requirements concerning large volumes and large geographic coverage. …
>
> Företagarna would like to point out in this regard that it follows from the directive in the classical sector as well as from the *travaux préparatoires* to LOU that a contracting authority may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. **Företagarna considers that an explicit provision in this respect should be added into the Swedish Act on Public Procurement.**
>
> **The point of departure for Företagarna is that as a rule, every contracting authority should conduct public procurement proceedings on its own.** Such separate procurement proceedings are more small-scale, which in turn creates opportunities for reasonable requirements making it possible for small undertakings to participate. Procurement proceedings by way of joint framework agreements should be used very restrictively and only if it is expected to lead to overall better final results for the concerned authorities."[84] (author's translation and emphasis)

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[82] Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell, *Offentlig upphandling På rätt sätt och till rätt pris* (Lund, Studentlitteratur AB, 2011), p. 102.

[83] The Swedish Federation of Business Owners.

[84] Opinion submitted by the organisation Företagarna on 27 January 2012 to the Swedish Public Procurement Law Committee, p. 6–7.

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

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

4. PUBLIC PROCUREMENT PRINCIPLES AND COMPETITION ASPECTS

4.1 Competition Aspects within the Principle of Proportionality

4.1.1 Competition aspects on barriers to entry for newly created undertakings

4.1.1.1 The Recruitment Services Case of 2008 – Göteborg Administrative Court of Appeal[86]

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

[85] Mats Bergman, Johan Y. Stake and Hans Christian Sundelin Svendsen, *Samordnade ramavtal – en empirisk undersökning*, published in the Reports Series of the Swedish Competition Authority in 2010, 2010:5, p. 86.

[86] Judgment of the Göteborg Administrative Court of Appeal in Case 1227-08, *Teamwork Bemanning AB* v *Helsingborg stad*, of 29 September 2008.

completed financial years were allowed to participate in the procurement proceeding. As to this requirement, the Göteborg Administrative Court of Appeal stated:

> "Also a newly created company can have hired competent staff holding several years of relevant experience in this area. Hence, the requirement that a tenderer shall have been active during at least two years is not justified **and such a requirement can restrict competition, because newly established companies are excluded from the procurement procedure in an improper way**."[87] (author's translation and emphasis)

4.1.1.2 The School Transport Case of 2009 – Göteborg Administrative Court of Appeal[88]

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

> "According to the EU law principle of proportionality, a contracting authority may not impose more far-reaching requirements on a supplier than is necessary to fulfil the purpose of a given procurement proceeding. The requirements imposed in a procurement proceeding must therefore have a natural link and be proportionate to what is to be procured. **Also the obligation to utilize the highest possible level of competition so that the number of those which can participate in the procurement proceeding is not limited more than necessary has to be taken into consideration**."[89] (author's translation and emphasis)

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

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87 Page 7 of the judgment.

88 Judgment of the Göteborg Administrative Court of Appeal in Case 2607-09, *Loffe's Företagstaxi AB* v *Alingsås kommun*, of 25 June 2009.

89 At p. 2–3 of the judgment.

4.1.1.3 The Safety Vest Case of 2012 – Stockholm Administrative Court of Appeal[90]

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

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

4.1.2.1 The SIDA Legal Services Case of 2012 – Stockholm Administrative Court[91]

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

4.1.3 Competition aspects concerning the object of the procurement proceeding itself

4.1.3.1 The Suture Case of 2010 – Supreme Administrative Court[92]

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

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[90] Judgment of the Stockholm Administrative Court of Appeal in Joined Cases 114-12 and 116-12, *Rikspolisstyrelsen* v *Mehler Varion System GmbH and Industri Textil Job AB*, of 23 May 2012.

[91] Judgment of the Stockholm Administrative Court in Case 22623-11, *MAQS Law Firm Advokatbyrå AB* v *Styrelsen för internationellt utvecklingsarbete (SIDA)*, of 6 February 2012.

[92] Judgment of the Supreme Administrative Court in Case 7957-09, RÅ 2010 ref 78, *Jämtlands läns landsting* v *Johnson & Johnson AB*, of 18 October 2010.

procured products must not contain triclosan) infringed the principle of proportionality. The Jämtland Administrative Court rejected the complaint.[93] On appeal, the Sundsvall Administrative Appeal Court stated that even though a contracting authority has a far-reaching freedom to freely choose what requirements it wants to impose on tenderers in a public procurement proceeding, all such requirements have to be compatible with the principle of proportionality. The Sundsvall Administrative Court of Appeal concluded that the requirement that the products in question must not contain triclosan infringed the principle of proportionality as the requirement did not constitute a suitable and effective means to fulfil the desired purpose.[94] The County of Jämtland appealed to the Swedish Supreme Administrative Court which stated the following:

> "When a contracting authority decides on details related to the object of a public procurement proceeding, it has a high degree of discretion. The contracting authority may, e.g., take environmental considerations by including requirements as to a product's environmental features in the contract specifications (LOU Chapter 6, Article 3). These requirements must be connected to what is to be procured, i.e. the requirements must relate to and have an influence on the product to be procured. A requirement that a product because of environmental considerations must not contain a certain substance has such a connection. However, the requirements imposed by the contracting authority must not infringe the principles of non-discrimination and freedom of movement for products and services; also in other aspects, the requirements must be in accordance with EU law. The requirement imposed by the contracting authority – that the sutures must be free from triclosan – are formulated in an objective way and do not discriminate against any supplier. Moreover, the requirement does not appear to be arbitrary or obviously subjective. In these circumstances, there is no reason for the Court to examine whether there is any real environmental advantage in avoiding sutures containing triclosan."[95] (author's translation)

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

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[93] Judgment of the Jämtland Administrative Court in Case 511-09 B, *Johnson & Johnson AB* v *Jämtlands läns landsting*, of 24 September 2009.

[94] Judgment of the Sundsvall Administrative Court of Appeal in Case 2437-09, *Johnson & Johnson AB* v *Jämtlands läns landsting*, of 30 November 2009.

[95] Judgment of the Supreme Administrative Court in Case 7957-09, RÅ 2010 ref 78, *Jämtlands läns landsting* v *Johnson & Johnson AB*, of 18 October 2010, p. 3–4.

4.1.3.2 The Invisible Light Case of 2011 – Sundsvall Administrative Court of Appeal[96]

Trafikverket conducted a public procurement proceeding concerning road tax-equipment in the Göteborg area. One of the mandatory requirements for a tender to be evaluated was that the offered equipment should use light which is invisible for the human eye. The Falun Administrative Court found that the requirement at hand "distorts competition in a way which infringes the principle of equal treatment prescribed by the Swedish Public Procurement Act" and that the requirement infringes the principle of proportionality as the requirement had not been necessary to achieve the intended purpose.[97] On appeal to the Sundsvall Administrative Court of Appeal, Trafikverket referred to a legal opinion issued by jur.dr. Andrea Sundstrand, according to which Trafikverket was not obliged to accept alternative technical solutions, e.g. such solutions including visible light. The opponent, Kapsch TrafficCom Aktiebolag, referred to a legal opinion issued by professor Ulf Bernitz, according to which the requirement related to invisible light constituted a far-reaching restriction of the possibility for undertakings to compete for the offer. The Sundsvall Administrative Court of Appeal referred to the above-mentioned judgment of the Swedish Supreme Administrative Court in the Suture Case.[98] In line with this precedent, the Sundsvall Administrative Court refrained from examining whether the requirement was compatible with the principle of proportionality, as the requirement concerned the very object of the public procurement proceeding. The Court thus found that the requirement did not infringe the Swedish Public Procurement Act.

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

In its Suture case precedent,[99] the Swedish Supreme Court has ruled that courts should not examine whether a requirement is compatible with the principle of proportionality when the requirement is related to the very object of the public procurement proceeding. In the author's view, this precedent is problematic

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[96] Judgment of the Sundsvall Administrative Court of Appeal in Case 1985-11, *Trafikverket* v *Kapsch TrafficCom Aktiebolag*, of 26 October 2011.

[97] Judgment of the Falun Administrative Court in Case 1741-11, *Kapsch TrafficCom* v *Trafikverket*, of 5 July 2011.

[98] Judgment of the Supreme Administrative Court in Case 7957-09, RÅ 2010 ref 78, *Jämtlands läns landsting* v *Johnson & Johnson AB*, of 18 October 2010.

[99] Judgment of the Supreme Administrative Court in Case 7957-09, RÅ 2010 ref 78, *Jämtlands läns landsting* v *Johnson & Johnson AB*, of 18 October 2010.

from a competition perspective as anti-competitive effects often relate to the very object of a public procurement proceeding. The consequence of the precedent is, *e.g.*, that the potential anti-competitiveness of requesting sutures not to include triclosan or a road tax equipment not to contain visible light[100] is, *de facto*, excluded from judicial control. Moreover, the issue whether a certain public procurement proceeding produces anti-competitive effects because of being too large or involving too many different contracting authorities, would equally be outside the scope of judicial control as such features can be said to be related to the very object of a public procurement proceeding. As will be discussed below, this means that competition concerns for the time being are not sufficiently protected by the principle of proportionality.

4.2 Competition Aspects within the Principle of Equality

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

4.2.1.1 The Fabricom Case of 2005 – CJEU[101]

A Belgian decree concerning public procurement contained the following provision:

> "No person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services shall be permitted to apply to participate in or to submit a tender for a contract for those works, supplies or services."[102]

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

> "[Provisions of EU law] preclude a rule … whereby a person who has been instructed to carry out research, experiments, studies or development in connection with a public works, supplies or services contract is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of *distorting competition*."[103] (emphasis added)

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[100] Judgment of the Sundsvall Administrative Court of Appeal in Case 1985-11, *Trafikverket* v *Kapsch TrafficCom Aktiebolag*, of 26 October 2011.
[101] Judgment of the CJEU in Case C-21/03 and C-34/03, *Fabricom* v *Belgium* (2005) ECR I-1559.
[102] Para. 12 of the judgment.
[103] Para. 47 of the judgment.

The CJEU thus ruled that it is contrary to EU law to automatically exclude a person from a public procurement proceeding on the grounds that the person has been engaged in previous research, experiments, studies or development in preparation of the procurement proceeding. Such a person should always be given an opportunity to prove that his earlier engagement did not lead to any experience which is capable of distorting competition, *i.e.*, giving him an unfair competitive advantage.

4.2.2 The Sprinkler Case of 2010[104] – The Stockholm Administrative Court of Appeal

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

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

4.2.3 The Pension Insurance Case of 2011 – Sundsvall Administrative Court of Appeal[105]

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

[104] Judgment of the Stockholm Administrative Court of Appeal in Case 6986-09, *Bravida Sverige AB* v *Uppsala kommuns Fastighetsaktiebolag*, of 11 February 2010.

[105] Judgment of the Sundsvall Administrative Court of Appeal in Case 2458-11, *Livförsäkringsaktiebolaget Skandia* v *Storumans kommun*, of 20 December 2011.

Pension Aktiebolag (KPA). Livförsäkringsaktiebolaget Skandia complained, arguing that the contract specifications to a very large extent were based on KPA's model documents. Skandia had therefore refrained from participating in the public procurement proceeding as it was so much rigged in favour of KPA that the contracting authority would not use the competition on the market and that it was meaningless for Skandia to participate. The Sundsvall Administrative Court of Appeal considered that the contract specifications resembled KPA's model documents. However, the Court found that Skandia had not proven any harm caused by this resemblance.

4.2.4 Competitive advantage to certain tenderers related to approximative size criteria

4.2.4.1 The Table-top Case of 2009 – Göteborg Administrative Court of Appeal[106]

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

4.2.4.2 The Food Supply Case of 2012 – Göteborg Administrative Court[107]

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

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

[107] Judgment of the Göteborg Administrative Court in Case 5593-12 E, *Martin & Servera AB* v *Västra Götalands läns landsting*, of 25 June 2012. The author of this article represented Martin & Servera AB in this case.

tenderers, when approximated figures were used when asking for certain content weight of food packages, a deviation of approximately 15 % would be accepted. Martin & Servera AB complained to the Göteborg Administrative Court. The Court found that approximately 15 % should be interpreted in such a way that deviations up to 17 % were permissible. As some of the products offered by Menigo Foodservice AB deviated between 20 to 50 % from the approximative weight requirements, the Göteborg Administrative Court of Appeal found that the contracting parties had infringed the Swedish Public Procurement Act by accepting the products in question.

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

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

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

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

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

[108] Opinion of AG Tesauro in Case C-63/89 *Assurances du Crédit* (at 1829).
[109] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Oxford and Portland, Oregon, Hart Publishing, 2011), p. 214.

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

4.3 The Competition Principle and The Purpose of Public Procurement Law

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

> "It is apparent from the second and tenth recitals in the preamble to Directive 93/37 that coordination seeks the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts **and the development, at the Community level, of effective competition** in that field, by promoting the widest possible expression of interest among contractors in the Member States"[110] (emphasis added)

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

> "LOU shall be interpreted and applied in accordance with the purpose and wording of the public procurement directives as well as the case law of the CJEU. The main purpose of EU public procurement law is freedom of movement for goods and services and that the area shall be opened for non-distorted competition. **Both LOU and the EU directives aim at public procurement proceedings to be conducted by utilizing existing competition in the best way. The provisions aim both at making use of competition in a given public procurement proceeding and developing effective competition.**
>
> The purpose of LOU [Chapter 11] Article 11 is to enable contracting authorities to control that the suppliers which have submitted a tender have the capacity to perform, before the tenders are evaluated. In order to meet the **main purpose of LOU, to foster competition**, the means of proving technical capacity have been limited by making the list of means exhaustive."[111] (author's translation and emphasis)

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

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

[110] Judgment of 16 December 2008 in Case C-213/08 *Michaniki* AE, para. 39.
[111] Judgment of the Stockholm Administrative Court of Appeal in Case 6528-10, *AB Familjebostäder* v *Berendsen Textil Service AB*, on 2 February 2011, p. 4.

> as to the principles of equal treatment, transparency and mutual recognition this is particularly clear. A contracting authority may not limit different undertakings' possibilities to be considered on equal terms as supplier in relation to public procurement proceedings."[112] (author's translation)

Albert Sánchez Graells has made the following points as to the role of competition in public procurement law:

> "Both competition law and public procurement have been the object of a certain instrumentalisation and have sometimes been used to promote 'secondary' policies or goals, eminently of a social or industrial nature. In the case of competition law, these goals have been almost unanimously dropped in recent years and a 'more economic' approach has clearly been embraced (particularly in the EU). In public procurement, the issue of the pursuit of secondary policies is still unsettled – but, in our view, a growing consensus towards minimizing this instrumental use of public procurement is identifiable (and, at any rate, seems the preferable option from a normative perspective). Finally, in the case of the EU, both sets of economic regulation have traditionally been significantly influenced by the goal of market integration – however, given the completion of the internal market process and the relative maturity of the system, the relevance of this goal is fading away in both cases, and is (re-) opening spaces that permit focusing on their 'core' objectives. In view of the substantial commonality of objectives, the protection of competition as a means to maximize economic efficiency and, ultimately, social welfare has been identified as the core common goal of both sets of economic regulation and as the ultimate foundation or aim for the development of a more integrated approach towards competition and public procurement law. Even if it may require a certain adjustability and trade-offs with complementary goals of public procurement (such as the transparency and efficiency of the system), a revision from a competition perspective is consistent with the basic goals and function of public procurement."[113]

The following extracts from the recitals to the Classical Sector Directive are of particular interest when analysing the role assigned to competition by the EU legislator in the field of public procurement:

> *Recital 2 – opening-up of public procurement to competition*
> "The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable

[112] Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell, *Offentlig upphandling På rätt sätt och till rätt pris* (Lund, Studentlitteratur AB, 2011), p. 15, 41–42 and 50.

[113] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 394–395.

to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and **to guarantee the opening-up of public procurement to competition**. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty." (emphasis added)

Recital 4 – no distortion of competition
"Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract **does not cause any distortion of competition** in relation to private tenderers." (emphasis added)

Recital 36 – effective competition
"**To ensure development of effective competition in the field of public contracts**, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto."[114] (emphasis added)

The following extracts from Articles of the Classical Sector Directive are of particular interest when analysing the role assigned to competition by the EU legislator in the field of public procurement:

Art 23 (2) – Technical specifications shall not have unjustified adverse effects on competition
"Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the **opening up of public procurement to competition**." (emphasis added)

Article 32 (2) – The duty not to restrict competition when using framework agreements
"Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition."

As set out in subsection 3.3.1 above, Article 32 (2) of the Classical Sector Directive imposes a duty on contracting authorities to ensure that their framework agreements do not have anti-competitive effects. If only Article 32 (2) is considered, it may seem reasonable to make an *e contrario* interpretation, which would lead to the view that contracting authorities are allowed to ignore the effects on competition if they choose to use agreements instead of framework agreements. It is obvious that the anti-competitive effects of a large agreement may be more adverse than those of a very small framework agreement.

An *e contrario interpretation* could have been justified if the Directive included no other competition obligations as to other aspects of public procure-

[114] Recital 36 of the Classical Sector Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works.

ment. However, this is not the case. According to Article 23 (2) of the Directive, contracting authorities are equally obliged to ensure that technical specifications do not result in unjustified anti-competitive effects. Hence, the provision in Article 32 (2) of the Directive does not constitute an exception to the rule, but is consistent with an overall competition principle embedded in the Directive, in particular in the above-mentioned recitals.

Albert Sánchez Graells has written the following on the role of the competition principle embodied in EU Public Procurement law:

> "The inquiry has shown – after reviewing current EU legislation and its interpretative case law – how **the EU public procurement directives have an embedded competition principle that constitutes a specification and makes direct reference to competition as a general principle of EU law – which serves the fundamental purpose of establishing the fundamental link between EU competition law and EU public procurement** law (which are to be seen as complementary sets of regulation that do not hold a special relationship *stricto sensu*). The competition principles offers the formal legal basis for the introduction and full enforcement of competition considerations in the public procurement setting, but the substance or content of that principles (i.e. its requirements and implications) need to be determined according to the general principles and criteria of EU competition law. In this regard, it has been submitted, that, according to this principle of competition, *EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit or distort competition – and contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition.*"[115] (emphasis in bold added by author)

In an article published in *Europarättslig Tidskrift* in 2002, Michael Slavicek, the then General Counsel at the Swedish National Board for Public Procurement, argued the following:

> "The Swedish Public Procurement Law is often referred to as a complement to competition law. This is not really true. A competitive and well-functioning market is certainly a condition for receiving good tenders. **However, contracting authorities shall not create well-functioning competition, but just utilize the competition which exists**."[116] (author's translation and emphasis)

This view has for a long time been treated as a truism in the Swedish public procurement community. However, as this article has tried to show, this is not really true anymore. Contracting authorities cannot take competition for granted and just utilize competition at hand. In fact, contracting authorities are

[115] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 396–397.

[116] Michael Slavicek, "Upphandlingens olika ansikten" (2002), 1 *Europarättslig Tidskrift* p. 17–18.

not only passive market spectators but active market participants whose actions may significantly affect market conditions and competition.

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

The Danish Associate Professor in Competition Law, Grith Skovgaard Ølykke, has made the following conclusion in a recent book on the modernisation of public procurement law – which is also very well suited to serve as a conclusion to the present section:

> "[W]hen the Commission has finally explicitly acknowledged the importance of undistorted competition between tenderers for the efficiency of public procurement procedures, it is necessary to go all the way and institutionalise competition law assessments in public procurement procedures. This institutionalisation could by through the oversight body or through increasing the role of National Competition Authorities in public procurement procedures; however, it is submitted that the most optimal solution would be to integrate the oversight bodies and the National Competition Authorities."[117]

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

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

As set out in section 2.1 above, the Swedish Competition Authority has taken a very tough attitude against anti-competitive cooperation between sellers in a public procurement proceeding. Even relatively small undertakings with low market shares do risk considerable fines if caught committing bid-rigging.

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[117] Grith Skovgaard Ølykke, "How Should the Relation between Public Procurement and Competition Law Be Addressed in the New Directive?", published *in EU Procurement Directives – modernisation, growth & innovation, Discussions on the 2011 Proposals for the Public Procurement Directives*, edited by Ølykke, Risvig & Tvarnö (DJØF Publishing, 2012), p. 83–84. For an in-depth analysis of competition aspects of abnormally low tenders, see Grith Skovgaard Ølykke's book *on Abnormally low tenders with an emphasis on public tenderers* (DJØF Publishing, 2010).

What then, about anti-competitive cooperation between buyers in public procurement proceedings? Swedish contracting authorities procure for approximately 500–600 billion SEK annually, which corresponds to approximately 15,5–18,5 % of Swedish GDP.[118] As to certain goods and services, contracting authorities have considerable market shares in the buying market and, hence, often significant market power as buyers.

Therefore, it is interesting to note that, to the author's knowledge, the Swedish Competition Authority has so far never taken any contracting authorities to court for breach of the competition rules related to joint purchasing by means of joint public procurement proceedings. In contrast, the Swedish Competition Authority has been very active – and successful – in taking contracting authorities to court for breach of the Swedish Public Procurement Act since the Authority was granted this power in July 2010.

The reluctance of the Swedish Competition Authority, as well as other European competition authorities, to apply competition law to public procurement is explained by Albert Sánchez Graells as follows:

> "From a different perspective, competition policy is an economic policy of 'offer', as its main focus is not on consumption, but on the production and offer of goods and services. Hence, competition policy is focused on the market behaviour of producers, or offerors – including intermediaries and economic agents other than consumers. This characteristic of competition policy conditions its scope in a way that passes unnoticed. The object of the present analysis lies only – or mainly – in the offer (i e production and distribution) of products and services and the ensuing market power that colluding and dominant firms can exercise. Other aspects of market competition receive relatively less consideration. However, the main focus of competition law should not be termed as the exercise of 'market' power, but as the exercise of 'selling' power. Such rephrasing automatically sheds light on a relatively unexplored field of competition law: the exercise of 'buying' power. This is an omission that is not justified in economic terms, since competition law should treat seller power and buyer power alike. Arguably, then, development of the strands of competition policy is largely conceived of as a set of rules regulating sellers' competition, whereas demand-side (or buyers') competition policy remains largely under-developed. The design and development of effective pro-competitive rules to discipline buying power are still incomplete.
>
> Public procurement is at the intersection of the two relatively unexplored fields of competition law, as it relates to the *demand-side* market behaviour of the *public sector*. Therefore, it should not be surprising to note that the enforcement of competition law in the public procurement environment has received much less attention than it deserves and, consequently, still remains largely underdeveloped. To be sure, restrictions competition generated by private entities participating in public

[118] Report 2012:3 on "Siffror och fakta om offentlig upphandling" published by the Swedish Competition Authority in 2012, which in turns refers to the report written by Mats Bergman on "Offentlig upphandling och offentliga uppköp – omfattning och sammansättning" commissioned by the Swedish Competition Authority and published in December 2008.

> procurement processes – mainly related to collusion and bid-rigging – have so far attracted most of the attention as regards the intersection of competition law and the public procurement phenomenon."[119]

In the field of competition law, market power is generally perceived as something bad and an important field of competition policy relates to the combat against (ab)use of market power in an anti-competitive way.

In the field of public procurement, though, contracting authorities' market power is generally perceived as something which can be used for good purposes. One interesting example is LOU Chapter 1, Article 9 a, which stipulates:

> "Contracting authorities should take environmental and social considerations into account in connection with public procurements, if the nature of the procurement motivates this."

In the Swedish public debate on public procurement it is generally perceived as something good if the contracting authorities can use their market power as large buyers, to achieve social and environmental progress by imposing more far-reaching obligations on tenderers in this respect than is common on the market in general.[120]

However, from a competition perspective, use of buyer market power may under certain circumstances be bad also if exercised by public authorities with good intentions. Albert Sánchez Graells has made the following points in this regard:

> "[T]**he exercise of public buyer power must be limited as much as necessary to avoid its abusive exercise, so that public contracts reflect normal market conditions.** The overall conclusion of the detailed analysis of public procurement rules indicate that, in order to promote the development of a more competition-oriented public procurement system, contracting authorities should change perspective (or rather, adopt a more competition-oriented perspective) and take into due consideration the potential effects of their decisions on competition for the contract and in the market concerned, placing special emphasis on not unduly restricting access to the tendering procedure, on not unnecessarily pre-determining the outcome of the tender procedure, and on guaranteeing that the result of the competitive process is not distorted or circumvented post-award, especially as a result of undue renegotiation, amendment, termination or re-tendering of the contract."[121] (emphasis added)

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[119] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 7–8.

[120] For a recent in-depth analysis of buyer power under U.S. competition law, see the article on "Looking at the Monopsony in the Mirror" by Maurice E. Stucke, professor in competition law at the University of Tennessee College of Law, 62 *Emory Law Journal* (forthcoming 2013).

[121] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 397.

Another reason for the absence of competition cases as to the actions of contracting authorities in relation to public procurement proceedings may be a wide-spread misunderstanding among market participants that actions by contracting authorities related to public procurement always are exempted from competition law. As will be shown in the next sub-section, this perception is actually wrong. According to settled case law of the CJEU in the FENIN and SELEX cases, competition law may fully apply to actions of contracting authorities in case certain conditions are fulfilled.

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

In the FENIN case, the General Court in March 2003 stated as follows:

> "[I]t is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic …, not the business of purchasing, as such. Thus, as the Commission has argued, it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. **The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.**
>
> Consequently, an organisation which purchases goods even in great quantity not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. **Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles [101(1) and 102 TFEU].**"[122] (emphasis added)

The reasoning of the General Court in this respect was subsequently upheld by the CJEU in its FENIN judgment of 11 July 2006.[123]

On 26 March 2009, the CJEU confirmed the view taken in FENIN in its SELEX judgment, where the CJEU stated as follows:

> "However, first of all, the Court of First Instance did not err in law when it stated … referring to the judgment in FENIN v Commission, that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put and **that**

[122] Judgment of the General Court in Case T-319/99, *FENIN* v *Commission*, of 4 March 2003, para. 36–37.
[123] Judgment of the CJEU in Case C-205/03 P, *FENIN* v *Commission*, para. 26.

> **the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity** […]. The Court of First Instance correctly concluded from this that the fact that technical standardisation is not an economic activity means that the acquisition of prototypes in connection with that standardisation is not an economic activity either."[124]

In a recent judgment given on 12 July 2012 in the Compass case, the CJEU has confirmed the approach taken in the FENIN and SELEX cases.[125]

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

According to the FENIN/SELEX case law of the CJEU, competition law is only applicable to purchase activities within public procurement if "the subsequent use of the purchased goods amounts to an economic activity".

Even very large joint purchases, made by contracting authorities having very high market shares on the buying market, are thus currently exempted from EU and consequently also from Swedish competition law, to the extent that the goods and services purchased are to be used exclusively for the exercise of public powers. As Albert Sánchez Graells rightly has concluded in his book on Public Procurement and the EU Competition Rules,[126] the FENIN – SELEX case law is not well-founded and should be reversed/adopted so that purchases by ways of public procurement fall under the scope of competition law – irrespective of the subsequent use made of the products or services by the contracting authority. If public authorities act on the market as buyers with strong market power the potential anti-competitive effects of joint purchase or other aspects of the public procurement proceeding are the same irrespectively of which use the contracting authorities subsequently choose to make of the goods and services procured.

A significant portion of goods and services purchased by Swedish contracting authorities are subsequently used for economic activity. According to the FENIN/SELEX case law of the CJEU, competition law is clearly applicable to such purchases. However, in view of a lack of enforcement activities from the Swedish Competition Authority in this regard, many contracting authorities

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[124] Judgment of the CJEU in Case C-113/07, P *Selex* v *Commission*, of 26 March 2009, paragraph 102.

[125] Judgment of the CJEU in Case C-138/11, *Compass-Dantenbank GmbH* v *Republik Österreich*, para. 38.

[126] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Oxford and Portland, Oregon, Hart Publishing, 2011), p. 152–166.

may be unaware of this fact. The Swedish Competition Authority should therefore consider attributing a higher level of priority to this issue. Any investigation initiated by the Swedish Competition Authority in this respect could generate a powerful signal to contracting authorities that competition law should be followed when designing public procurement proceedings.

It is interesting to note that the Swedish Competition Authority until November 2008 in fact had an explicit right to take legal action against any action related to public procurement which in a significant way distorted competition, under the Act on Intervention against Improper Actions Related to Public Procurement.[127] This applied irrespectively of the subsequent use made of the products or services procured by the contracting authority. The Swedish Competition Authority was entitled to file a plaint at the Swedish Market Court, which then could prohibit a specific anti-competitive action by a contracting authority. However, the Swedish Competition Authority very rarely applied the Act on Intervention against Improper Actions Related to Public Procurement and the Act was therefore abolished in 2008.

In the remainder of this article, we will have a brief look at the provisions of competition law governing long term distribution agreements and joint purchasing. These provisions are applicable to long framework agreements and joint procurement as long as the goods and services procured subsequently are used for economic activities and not exclusively for the exercise of public powers.

5.4 Long Term Exclusive Purchase Agreements under Competition Law

If a contracting authority undertakes to exclusively order products or services from a certain framework agreement, the framework agreement can be classified, under competition law, as an exclusive purchase obligation. Such agreements are under competition law considered to be a form of non-compete obligation, which itself is part of the wider group of so called vertical constraints.[128]

Non-compete obligations may infringe Article 101 (1) TFEU (respectively Chapter 2, Article 1 of the Swedish Competition Act). However, according to Article 2 of the Vertical Block Exemption Regulation, most forms of vertical constraints are exempted from the application of Article 101 (1) TFEU, if the market share on the relevant market of both the supplier and the buyer does not exceed 30 %.

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[127] Lag (1994:615) om ingripande mot otillbörligt beteende vid upphandling (LIU).

[128] For an in-depth analysis of vertical constraints under Swedish and EU law, see Lars Henriksson, *Distributionsavtal – vertikala avtal och konkurrensrättsliga aspekter* (Norstedts Juridik, 2012). Exclusive purchase obligations are covered on pages 90 ff.

However, Article 5 (1) of the Vertical Block Exemption Regulation[129] stipulates an exemption from the exemption as follows:

> "The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:
>
> (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years"

This means that even if the tenderer has a market share of less than 30 % of the selling market and the contracting authority has a market share of less than 30 % of the buying market, a commitment from the contracting authority to order exclusively from a framework agreement having a validity of more than five years may constitute an infringement of EU and Swedish Competition law. This is explained in the Vertical Guidelines of the Commission as follows:

> "The first exclusion is provided for in Article 5(1)(a) of the Block Exemption Regulation and concerns non-compete obligations. Non-compete obligations are arrangements that result in the buyer purchasing from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year (as defined by Article 1(1)(d) of the Block Exemption Regulation), thereby preventing the buyer from purchasing competing goods or services or limiting such purchases to less than 20 % of total purchases. … Such non-compete obligations are not covered by the Block Exemption Regulation where the duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the Block Exemption Regulation (see the second subparagraph of Article 5(1)). In general, non-compete obligations are exempted under that Regulation where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period."[130]

Even if the exemption is not applicable to a given framework agreement, an individual exemption under Article 101 (3) TFEU may be granted if the supplier has made considerable relationship-specific investments. This is explained in the Commission Vertical Guidelines as follows:

> "In the case of a relationship-specific investment made by the supplier …, a non-compete … for the period of depreciation of the investment will in general fulfil the conditions of Article 101(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment

[129] Commission Regulation (EU) No 330/2010 of 20 April on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, published in the Official Journal of the EU on 23 April 2010, L 102/1.

[130] Guidelines on Vertical Restraints, published on 19 May 2010 in the Official Journal of the EU, C 130/1, para. 66.

> by the supplier when this equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are normally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans on the premises of or next to the canning facility of a food producer, this new capacity may only be economically viable when producing for this particular customer, in which case the investment would be considered to be relationship-specific."[131]

This means on the one hand that a 20 year validity of a framework agreement containing an exclusive purchase obligation may be perfectly compatible with competition law if the supplier is requested to build a relationship-specific facility with a depreciation time of 20 years. On the other hand, a framework agreement including exclusive purchase obligations may infringe competition law even if the validity is shorter than five years, say three years, on the condition that the respective market shares of the supplier and the contracting authorities are above 30 %.

Too long framework agreements can thus under EU and Swedish competition law be punished with fines ranging up to 10 % of an undertaking's turnover. However, as set out in section 5.3 above this does not apply to contracting authorities purchasing goods and services exclusively for using them in the exercise of public power and not in economic activities. In such cases (only), procurement is exempted from competition law under the FENIN/SELEX case law of the CJEU.

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

The Swedish Competition Authority has published the following guidance on its website as to competition law applicable to joint public procurement proceedings: problems related to public procurement:

> "Municipalities, counties and Government authorities often cooperate in order to make favourable purchases to the benefit of the Swedish economy and of consumers. Under certain circumstances, such cooperation may restrict or harm competition on the market and infringe competition law related to anti-competitive cooperation. The risk for sellers being obliged to accept unreasonable purchasing requirements increases the more far-reaching the cooperation is. The effect of this is fewer market entrants and that new investments are limited or do not longer occur at all. When municipalities, counties and Government authorities coordinate their pur-

[131] Guidelines on Vertical Restraints, published on 19 May 2010 in the Official Journal of the EU, C 130/1, para. 146.

> chases, also suppliers may be more interested in cooperation to strengthen their market position. A development towards more concentration among both buyers and sellers can restrict competition resulting in higher prices and lower quality of goods and services. It shall also be borne in mind that cooperation among suppliers increases the risk of spilling over into bid-rigging."[132]

In its Horizontal Guidelines published in 2011, the European Commission provides guidelines as to how joint purchasing is to be treated under competition law.[133] The Commission defines joint purchasing as follows:

> "Joint purchasing can be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation (collectively referred to as 'joint purchasing arrangements'). Joint purchasing arrangements usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers. However, buying power may, under certain circumstances, also give rise to competition concerns."[134]

Whether joint purchasing, respectively joint procurement, is problematic under competition law depends on the combined market shares of the buyers in the buying market as set out by the Commission as follows:

> "There is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, in most cases it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15 % on the purchasing market or markets as well as a combined market share not exceeding 15 % on the selling market or markets. In any

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[132] The document "Examples of competition problems related to public procurement proceedings" can be downloaded in Swedish language from the Swedish Competition Authority's homepage under http://www.kkv.se/t/Page.aspx?id=387.

[133] Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines), para. 194–220. As to competition aspects of public procurement, it is interesting to note that the Spanish Competition Authority, the Comisión Nacional de la Competencia, recently has published a Guide on public procurement an competition of approximately 45 pages, it can be downloaded here: http://www.cncompetencia.es/Inicio/Informes/GuíasyRecomendaciones/tabid/177/Default.aspx. Competition aspects of public procurement have also been covered by two interesting reports commissioned by the Swedish Competition Authority and published on its webpage www.kkv.se: Report 2009:4 on "Effektivare offentlig upphandling – problem och åtgärder ur ett rättsekonomiskt perspektiv" written by Eva Edwardsson and Daniel Moius; report 2011:1 on "Osund strategisk anbudsgivning i offentlig upphandling" written by Karl Lundvall and Kristian Pedersen. Strategic issues of public procurement are dealt with in a recent book on "Strategisk offentlig upphandling" written by David Braic, Magnus Josephson, Christoffer Stavenow and Eva Wenström (Jure Förlag AB, 2012).

[134] Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1, para. 194.

> event, if the parties' combined market shares do not exceed 15 % on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled.
>
> A market share above that threshold in one or both markets does not automatically indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition. A joint purchasing arrangement which does not fall within that safe harbour requires a detailed assessment of its effects on the market involving, but not limited to, factors such as market concentration and possible countervailing power of strong suppliers."[135]

In case joint purchasing respectively joint procurement is anti-competitive, such co-operation may still be exempted and thus be admissible under competition law if the arrangement gives rise to significant efficiency gains as stated by the Commission:

> "Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale. Moreover, joint purchasing arrangements may give rise to qualitative efficiency gains by leading suppliers to innovate and introduce new or improved products on the markets.
>
> Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a purchasing agreement do not meet the criteria of Article 101(3). An obligation to purchase exclusively through the co-operation may, in certain cases, be indispensable to achieve the necessary volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case."[136]

As follows from the Horizontal Guidelines, joint procurement is likely to be problematic if the contracting authorities have a combined market share on the buying market exceeding 15 % provided that participating contracting authorities are obliged to exclusively place orders from the joint framework agreement. Large contracting authorities, such as for example Sweden's three largest cities, Stockholm, Göteborg and Malmö, risk having market shares exceeding 15 % on the buying market in goods and services particularly targeted to their needs. Therefore, such large contracting authorities should carefully consider the effects on competition before entering into joint procurement agreements with other contracting authorities, as such agreements under certain circumstances may infringe competition law.

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[135] Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines), para. 208–209.

[136] Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements published in the Official Journal of the EU on 14 January 2011, C 11/1 (The Horizontal Guidelines), para. 217–218.

According to paragraph 205 of the Horizontal Guidelines, the risk that joint purchasing arrangements restrict competition is particularly high when joint purchasing has the effect of a disguised buyer cartel. Whether a joint procurement proceeding can be characterised as a buyer cartel depends on how it is structured. If tenderers are allowed to submit different tenders for every participating contracting authority, i.e. there is one lot per contracting authority, prices paid by the contracting authorities may vary among them. However, if there is no such division into lots, the effects of the public procurement proceeding will be comparable to those of a price cartel among buyers, as it ensures that none of the participating contracting authorities risk paying more for procured goods and services than other contracting authorities.

Joint purchasing and buyer cartels can under EU and Swedish competition law be punished with fines ranging up to 10 % of an undertaking's turnover. However, as set out in section 5.3 above this does not apply to contracting authorities purchasing goods and services exclusively for using them in the exercise of public power as opposed to use for economic activities. In such cases (only), procurement is exempted from competition law under the FENIN/SELEX case law of the CJEU.

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

Since July 2010, tenderers have the right to initiate legal proceedings before a Swedish administrative court, with a view to declare agreements void when being a result of an illegal direct award. However, according to LOU Chapter 16, Article 17, such action for voidness is time-barred when six months have passed after the agreement was concluded.

Therefore, it may be interesting for tenderers to instead use the voidness provisions provided by the Swedish Competition Act and the TFEU. Agreements which are found to be anti-competitive without any efficiency-based reason for exemption are not only punishable with fines but are also void under Article 101 (3) TFEU and Chapter 2, Article 6 of the Swedish Competition Act. Injunction actions based on voidness resulting from on-going competition law infringements are never time-barred and can be initiated as long as the agreement is still in place.

In this respect, private enforcement of competition law may have an important role to play. However, according to Swedish competition law, tenderers wanting to attack the validity of a procured agreement under competition law may not directly go to court. Instead, they must first file a complaint to the Swedish Competition Authority. Only if the Competition Authority should decide not to pursue the case, a tenderer could then use its so called subsidiary

right of action and initiate an injunction procedure before the Swedish Market Court.[137]

Moreover, if a contracting authority or a supplier finds that an agreement infringes competition law they have the possibility to invoke this invalidity as a reason to cease honouring the agreement in question.

Direct agreements between a contracting authority and a supplier are directly void to the extent they infringe competition law. However, as to anti-competitive agreements to initiate joint procurement proceedings, this will not necessarily affect the validity of the agreements subsequently entered into between the individual contracting authorities and suppliers. The question here is whether so called "vertikala följdavtal" – vertical agreements implementing an anti-competitive horizontal agreement – should be deemed to be void because of the overriding horizontal agreement being void. In an article published almost ten years ago in Europarättslig Tidskrift, the author of the present article argued that this should be the case under certain circumstances.[138]

6. CONCLUSIONS

The main conclusions of this article are as follows:

- The Swedish Public Procurement Act should be amended highlighting the general unlawfulness of joint bids under competition law. Joint bids are only legal under competition law if it would not have been possible for the tenderers to submit independent tenders without help from the other parties to the joint tender.
- The Swedish Public Procurement Act should be amended highlighting the duty not to restrict competition in connection to framework agreements embodied under Art 32 (2) of the Classical Sector Directive. This duty should be transferred from soft law to a hard legal ground for court intervention in case of breach.
- The competition principle embodied in the Classical Sector Directive imposes an active obligation to ensure that the way contracting authorities conduct public procurement proceedings is pro-competitive and not anti-competitive. Swedish administrative courts should therefore not treat the Directive's pro-competition provisions as soft law but as hard law in the sense that infringements of the competition principle should be considered as

[137] Chapter 3, Article 2 of the Swedish Competition Act.

[138] Robert Moldén, "Förutsättningar för följdavtals ogiltighet – en replik" (2003) 2 *Europarättslig Tidskrift* p. 337 ff. In a more recent article published in the same journal, Elisabeth Eklund deals with this issue, see Elisabeth Eklund, "Kartellavtal måste kunna anses konkurrensrättsligt ogiltiga i förhållande till tredje man" (2011) 1 *Europarättslig Tidskrift* p. 185 ff.

infringements of the Swedish Public Procurement Act in the same way as infringements of, e.g. the principles of proportionality and equality.

- There is a need for more economic analysis in public procurement litigation, and consequently, for more economists in this area, both in private practice and at the Swedish Competition Authority.
- Other Member States should consider following the Swedish example in voluntarily applying EU law to both competition law and public procurement law under the respective EU thresholds. Such an approach can be expected to lead to increased competition and more market integration within the EU.
- In view of considerable synergies, other Member States should consider following the example of Sweden where enforcement of both competition law and public procurement law has been entrusted to the same authority since 2007, namely the Swedish Competition Authority.
- According to the FENIN/SELEX case law of the CJEU, competition law is only applicable to purchase activities within public procurement if "the subsequent use of the purchased goods amounts to an economic activity". Even very large joint purchases, made by contracting authorities having very high market shares on the buying market, are thus currently exempted from EU and consequently Swedish competition law – to the extent that the goods and services purchased are to be used exclusively for the exercise of public power. As Albert Sánchez Graells rightly has concluded in his book on Public Procurement and the EU Competition Rules,[139] the FENIN – SELEX case law is not well-founded and should be reversed/adopted so that purchases by ways of public procurement fall under the scope of competition law irrespective of the consequent use made of the products or services by the contracting authority.
- A significant portion of goods and services purchased by Swedish contracting authorities are subsequently used for economic activity. According to the FENIN/SELEX settled case law of the CJEU, competition law is applicable to such purchases. However, in view of a lack of enforcement activities from the Swedish Competition Authority in this regard, many contracting authorities may be unaware of this fact. The Swedish Competition Authority should therefore consider attributing a higher level of priority to this issue. Any investigation initiated by the Swedish Competition Authority in this respect could generate a powerful signal to contracting authorities that competition law should be followed when designing public procurement proceedings.

[139] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 152–166.

- Private enforcement of competition law may have an important role to play as to anti-competitive agreements entered into by contracting authorities. Whereas voidness actions based on infringements of public procurement law are time-barred when six months have passed after signing of the agreement, injunction actions based on voidness resulting from on-going competition law infringements may be brought during the entire lifetime of a distribution agreement entered into by a contracting authority.