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FIGHTING CORRUPTION AND PROMOTING COMPETITION

Contribution from Sweden

-- Session I --

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FIGHTING CORRUPTION AND PROMOTING COMPETITION

-- Sweden--

1. Bid-rigging as a form of corruption

1. Many international guidelines and reports on corruption either include bid-rigging under the term 'corruption' itself, or treat corruption and bid-rigging as linked integrity issues in public procurement. For instance, Transparency International lists cartels and collusion among the various forms of corruption in its *Handbook – Curbing Corruption in Public Procurement*, while the *United Nations Convention against Corruption: implementing procurement-related aspects* indicates "collusive practices" among the four enumerated forms of corruption. Examples of the latter approach are the *OECD Principles for Integrity in Public Procurement* as well as the European Parliament Note *Risks of Corruption and Collusion in the Awarding of Concession Contracts*.

2. The Swedish Competition Authority (SCA) believes this broader understanding of corruption is appropriate for at least three different reasons: Firstly, this understanding of the term corruption presumes that corruption is not primarily a criminal offence, the curbing of which can be entrusted to law enforcement agencies alone. Many forms of corruption are not punishable under national criminal laws. However, they can be just as harmful to our democratic institutions and businesses as in the long term they can damage a country's reputation and may also hamper investments in the country. Secondly, from this view on corruption follows that efforts in fighting corruption should increasingly target the underlying mechanisms that feed the various forms of corruption. Moreover, these efforts should follow a set of core principles and ideas, including transparency, accountability and creating and enforcing a level playing field for businesses. Thirdly, this perspective leads to the conclusion that the allocation of tasks, operational instruments, and cooperation among the institutions charged with curbing different forms of corruption must aim to be seamless and intuitive. Specifically in relation to this contribution, this view supports the conclusion that competition authorities, in stemming bid rigging, are also per se involved in fighting corruption.

3. Corruption in the context of public purchases is, amongst other things, also an anti-competitive infringement. It can be used to eliminate competition and counteract the very purpose of public procurement. One way for an unscrupulous company to achieve this is to influence the procurer not to publish a contract notice, resulting in an illegal direct award of the contract at stake. Another way for a company to eliminate competition is to combine corruption with its involvement in a cartel: It may use bribes to make the procuring officer reveal secret information, or to convince him or her to turn a blind eye to the cartel.

4. Cartels and corruption are both liable to cement existing market structures and reduce dynamism, innovation and healthy competition. Just as leniency programs aim to destabilise cartels by introducing an element of distrust between its members, effectively fighting corruption among procurement officials can help to further narrow down the "circle of trust" in a bid-rigging ring and increase the chances of whistleblowing.

5. Sweden has historically been considered relatively spared from corruption, and has continuously been ranked among the countries most resistant to corruption in various comparative studies and indexes. Regrettably, recent surveys and reports challenge that image, and public procurement is frequently put forward as a risk area. This is particularly true where “corruption” is understood in a wider sense. For instance, according to a recent EU-wide survey, 51 per cent of Swedish respondents thought the giving and taking of bribes, and the abuse of power for personal gain, was widespread among officials awarding public tenders.¹ In another survey conducted by The Swedish National Audit Office, national authorities listed public procurement and purchasing as the activity thought to give rise to the greatest risk of corruption within the respective authorities.²

6. However, the conditions favourable to various forms of corruption can sometimes be brought about by procurers doing their job too well. This is particularly true in award procedures characterised by static industries, repetitive tendering, an unmitigated focus on prices, and bid prices being known to competitors. Under these circumstances, a situation may arise where companies look for means of offsetting the price pressure by resorting to various forms of corruption in order to be awarded future contracts as they cannot become more efficient, cut costs or reduce profits. This may include enlisting competitors in bid-rigging schemes, bribing procurement officials, using black market labour, fraudulent debiting, or intentionally underachieving on their contract performance to save money.

2. The tasks of the Swedish Competition Authority

7. Besides its task to safeguard and increase competition, the SCA is also the supervisory body for public procurement. In the field of public procurement, the SCA is to focus its activities on direct illegal awards of public contracts. In the event of illegal direct awards, the SCA may apply to court for the imposition of a public procurement fine.

8. Although representing different areas of legislation, prohibitions against bid-rigging cartels and illegal direct awards of contracts both aim to curb anti-competitive behaviour. In the SCA’s opinion, the combination of the two powers in one authority creates important synergies. For instance, our procurement work generates a significant inflow of cartel and bid-rigging matters, and the procurement expertise that we have within the authority is extremely useful when investigating bid-rigging cartels.

9. It is thus the view of the SCA that fighting corruption is not a task that should solely be entrusted to criminal law enforcement agencies and courts. Most instances of corruption – in a wider sense – in Sweden are not punishable under criminal law as bribery but rather come in the form of favouritism, nepotism, and other types of conflicts of interest. Within the scope of public procurement, such connections between public officials and companies may lead to public contracts being awarded without a transparent tendering process. As a consequence, we believe that our chief task in enforcing public procurement laws, namely stemming illegal direct awards, can be an effective but sometimes overlooked instrument in fighting corruption in public procurement.

3. Cooperation between institutions fighting corruption and anti-competitive behaviour

10. Despite the possibility that the different types of infringement mentioned above may be interlinked, corruption-related crimes are today investigated by the police, whereas cartels and illegal direct awards of contracts are the responsibility of the SCA. Because of the likelihood of connections between these different types of infringement, in the past few years the SCA has intensified its cooperation with the Swedish National Anti-Corruption Unit, the special unit of prosecutors who lead investigations regarding

¹ European Commission, Special Eurobarometer 374, published in February 2012.

² The Swedish National Audit Office, Report 2013:2.

bribery cases. This cooperation involves the exchange of anonymised information regarding suspected markets and pre-studies conducted by the respective authorities. Representatives from the respective authorities meet approximately every six weeks to discuss issues and developments which might be of interest for the other authority. We have also published two articles, one of which was co-authored by the National Anti-Corruption Unit. The articles send the message that if public procurement officials observe signs of corruption they should also search for signs of cartel activity. We have organised mutual education activities where staff from the SCA have educated police officers who investigate bribery in how to recognise signs of bid-rigging. Similarly, staff from the Anti-Corruption Unit have taught case-handlers at the SCA how to recognise signs of corruption.

11. So far, we have had suspicions in some cases, but we have no statistics or actual cartel cases to show that both types of infringement exist in the same case. This is not evidence that such links do not exist.

12. What we have gained so far from our cooperation with the Anti-Corruption Unit is more related to advocacy than to actual tip-offs regarding competition law infringements. It is, however, both the SCA's and the Anti-Corruption Unit's view that if we cooperate in every way possible – i.e. subject to rules on confidentiality – we can improve the chances to prevent, discover and efficiently investigate a greater number of suspected infringements in both our areas of responsibility and expertise. In a recent project on unfair competition in public procurement, we have also interviewed representatives of the Swedish branch of Transparency International and the Swedish Anti-Corruption Institute. These added new insights into possible links between corruption and competition, but also contributed to a deeper understanding in other institutions of the need to observe both competition law and procurement law.

4. Challenges in investigating corruption and anti-competitive behaviour

13. The different forms of corruption have in common that they are generally speaking difficult to expose: Evidence of corruption is difficult to discover, investigations are time-consuming and resource-intensive, and the substantial evidence of the offence is usually tightly controlled by the perpetrators. Furthermore, the authorities charged with curbing and investigating different forms of corruption each have their own principles of prioritising between various tip-offs, different methods and tools of investigation, and have to meet different legal requirements to successfully bring their investigations to court. Moreover, in some cases the understanding that another authority is in a better position to bring an infringement to justice may give rise to the view that other tips and cases should be prioritised, rather than two authorities investigating what are essentially two aspects of the same infringement.