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Interactive Guidance and
Other Outreach Efforts by the
Swedish Competition
Authority

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I. INTRODUCTION

How do you give accurate, simple, and useful guidance in an area of competition law where the knee-jerk answer to most questions tends to be: “It depends”? This was the challenge the Swedish Competition Authority (“SCA”) set itself when we decided to develop a web-based interactive guidance for companies wishing to collaborate in procurement. Our primary focus group was small and medium sized enterprises (“SMEs”) with none or little previous experience in competition law. A few months later the project was completed and launched in tandem with a road-show at various industry organizations.

The purpose of the guidance was to offer clearer guidance on when, and in what circumstances, companies are allowed to cooperate when tendering for contracts in a procurement context. Perhaps due to the sparse case law on the subject both in Sweden and at EU level, the SCA had seen signs that companies as well as purchasers often have a hard time identifying where the line is drawn between competitive and anticompetitive cooperation. As a consequence, the SCA has had a number of cases over the last couple of years concerning potentially illegal cooperation, particularly in the context of public procurement. We felt there was a need to couple that enforcement work with more preventive outreach work, assisting companies in this matter at an earlier stage.

So, why guidance on this particular topic, among the countless grey areas of competition law? First of all it is our view that if smaller companies would collaborate in procurements to a greater extent, this could have a positive and strengthening effect on competition. Each year municipalities, county councils, and the government in Sweden procure goods and services for over SEK 500 billion (approximately EUR 55 billion). A large part of the private sector also chooses to procure by some form of bidding procedure. Often large and established companies have an advantage when competing for these contracts. In larger procurements, only a few players in the market may have the capacity to bid independently. Cooperation between smaller companies could be a way for them to submit tenders in procurements and thereby strengthen competition throughout markets.

Secondly, SMEs are less likely to have access to in-house or even external competition law expertise. This may lead to inadvertent breaches of the rules in some instances, but also to over-prudence in other cases. Providing clearer guidelines could therefore encourage pro-competitive collaboration in sectors where SMEs could compete with larger businesses. The purpose of the

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initiative is to encourage cooperation, which means more competition for contracts while discouraging collaboration reducing such competition.

II. A WEB-BASED INTERACTIVE GUIDANCE

The SCA's web-based interactive guidance can be used by both procurers and companies and focuses on frequently asked questions—from the specific “Can we cooperate in this particular tender?” to the more general “What forms of cooperation are permitted?” and “When am I allowed to use a competitor as subcontractor?.” The user is also informed of what the consequences of illegal cooperation might be.

Throughout the guide “pop-ups” appear where the user can get more detailed information about the specific question or examples based on real cases. The user can choose different levels of details; from short informative answers to more extended information and up to complete versions of court decisions for those wishing to get the full picture. Finally, the user gets an indicative answer on whether the situation in question is likely to be permitted or not. The guidance also stresses, however, that in case of any uncertainty the user should seek legal advice.

The reason why we chose the interactive guidance tool for this outreach initiative is that we have positive experiences of a previous project using web-based guidance. In that case the topic was activities of trade associations, focusing primarily on exchanges of information. That guidance has drawn positive feed-back, not only from companies, but also from lawyers and other practitioners.

An advantage with an interactive guidance, in addition to its easy-to-use Q&A-format, is that it only takes a few minutes to get acquainted with the applicable rules, at least at a basic level. SMEs considering cooperating in a procurement are now able, in advance, quickly, and anonymously to find out whether their cooperation is in accordance with the rules, or if they should act differently.

Since the interactive guidance was published last year, it has been marketed in different ways; during seminars and conferences, as well as in our regular contact with companies and procurers. Even though there are no formal statistics due to the anonymous nature of the guidance tool, the SCA strongly believes that the guidance is a helpful tool for SMEs without prior experience with competition law. For anyone interested, both guidance tools can be found in Swedish at the SCA's website, www.konkurrensverket.se/vagledning.

III. OTHER EDUCATIONAL AND OUTREACH EFFORTS

In the last *Antitrust Chronicle* issue devoted to educational and outreach efforts, the SCA's Chief Economist Arvid Fredenberg wrote about our annual conference, “Pros and Cons,” which consistently attracts a range of high-caliber speakers on competition economics.² The latest Pros and Cons conference was held in Stockholm in December 2013, on the topic “The

² Arvid Fredenberg, *Ten Years of Pros and Cons Conferences*, 8(1) CPI ANTITRUST CHRON. (August 2012). The article is available at http://www.kkv.se/upload/Filer/Forskare-studenter/ProsCons/Competition_Policy_Internationals_Antitrust_Chronicle_Sweden_Aug-12.pdf.

Pros and Cons of Counterfactuals.” This year’s topic is “The Pros and Cons of Antitrust in Two-Sided Markets.”

Another example of the SCA’s educational efforts is a “checklist” and a related brochure primarily aimed at procurement officials but also for private companies procuring by bidding processes. The checklist sets out twelve signs that suggest that companies may have formed a bid-rigging cartel. The purpose of the related brochure, which explains the twelve signs in further detail, is to increase procurers’ awareness that they can actually conduct better business by using the checklist and by being observant. Of course, if a procurer finds indications of a bid-rigging cartel, the SCA also encourages them to contact us. During the development of the checklist, we were inspired by similar products by other organizations such as the OECD and other competition authorities around the world. The SCA’s checklist and brochure have been handed out to procurement officials all over Sweden and can also be found on our website.

Parallel with the launch of our latest interactive guidance on cooperation in procurement, the SCA underwent some important organizational changes. We are now a larger, reinforced organization which, as of January 2014, is responsible not only for enforcement of the competition and procurement rules but also for procurement support to public procurers and tenderers. This means that the authority handles both advisory support and supervision of procurement matters. The combination of policy, support, and enforcement matters for both competition law and procurement, and the resultant sharing of knowledge and experience between the departments, makes the SCA unique in Europe. It puts us in a strong position to handle matters that straddle the two areas, such as bid-rigging cartels and other forms of cooperation in procurement. Enforcement of infringements is just one of the ways in which we now work.

IV. THE BENEFITS OF EDUCATIONAL AND OUTREACH EFFORTS

The two interactive guidances, the checklist, and the brochure are some of the SCA’s recent educational and outreach efforts aiming to raise awareness among companies and in the long term prevent anticompetitive behavior. The combination of all educational and outreach efforts, together with SCA’s regular law enforcement, is hoped gradually to increase the number and quality of tip-offs received by the SCA. Even though not every tip-off is detailed enough to let us carry out a dawn-raid, they all add pieces to the puzzle and indicate which markets may merit closer scrutiny.

Since it is part of the SCA’s mission to prevent competition problems and inform the public, we engage in different forms of dialogue with stakeholders in addition to the above mentioned approaches. We frequently give presentations and arrange seminars for procurement officials, trade associations, and the public with the purpose of educating them, for instance on how to recognize signs of anticompetitive behavior. In addition, both the SCA’s Communications Department and the Cartels and Mergers Unit work extensively and proactively with external communication in various ways. Benefits of these kinds of educational efforts include a more direct communication with stakeholders, which produces the possibility of getting immediate feed-back and initiating a two-way discussion. Furthermore this more direct external communication work provides a way to get to know and understand current activities in various sectors.

The SCA believes that the combination of educational and outreach efforts, together with support, policy, and law enforcement, is the most effective way in order to safeguard and increase competition in Sweden and live up to our vision “Welfare through well-functioning markets.”