

## **Regulation Policy and Deterrence in Times of Crisis**

*Anförande av Hanna Witt, avdelningschef vid Konkurrensverket, vid Competition summit 2013 den 5 december 2013 i Bryssel.*

*Speech of Ms. Hanna Witt, Head of Department of the Swedish Competition Authority, at the Competition summit 2013, 5 December 2013 in Brussels.*

*Check Against Delivery*

Thank you very much for the invitation to speak here today about Regulation Policy and Deterrence in Times of Crisis. This topic indeed includes a very wide range of possible matters to talk about and I have chosen to focus my presentation on public procurement, cartels and competition neutrality. The reason for this is that the Swedish Competition Authority has an unusual mix of responsibilities which puts us right at the interface between competition, procurement and public/private interaction in the marketplace.

The Swedish Government has chosen to gather the enforcement of competition law and procurement law in one authority and has recently put even more emphasis on competition by giving us a broader range of tasks and a larger budget to offer advisory support to procurers and to increase our focus on prevention and pro-active measures. Although representing different areas of legislation, competition and public procurement are closely linked together. Public procurement affects a substantial share of world trade flows and in Sweden it represents approximately 17% of GDP. In many sectors, therefore, effective public procurement is crucial for well-functioning competition. If contracts are awarded without a fair and transparent procedure, from a tax payer perspective there will be no guarantee that the best deal has been reached. There will also, from a supplier viewpoint, be a market distortion, as the public purchaser has discriminated against all those potential suppliers who were not allowed to present their bids.

So, how are competition and competitiveness affected by crisis?

It is well documented that competition contributes to economic growth and increases welfare. This is supported by historical evidence, which clearly indicates that actions that restrict competition actually prolong economic difficulties in times of crisis and postpone recovery. In a downturn, competition may be fiercer when firms have to compete hard to sell their products. However, they may also choose to tackle falling demand by engaging in a coordinated reduction of capacity. Studies of discovered cartels show that many cartels have been initiated in times of crisis. If the perceived risk of detection is low, firms may disregard the illegality of cartels and see a cartel agreement as the best way to reduce uncertainty. We generally think that cartels are the worst competition problem and, consequently, put a lot of effort into promoting our leniency program. However, Sweden faces the same situation as many other small economies - we do receive some high quality leniency applications, but, unfortunately, not as many as we wish. Experience and research show that the corner stones of an effective leniency program are deterrent sanctions, predictability, transparency and a high risk of detection. To put it bluntly: it is about creating fear among cartelists and about making them feel welcome and safe when they come to the competition authority to confess. Our challenge is to create fear even though we don't have any criminal sanctions and even though our fines, in an international context, appear quite low. So how do we tackle that challenge?

[Photo of economists in work] This is one way of doing it. You might think that these guys don't look capable of invoking fear in anyone, but appearances can be deceiving. They are excellent econometricians and they help us develop our expertise in quantitative analytic methods for cartel detection. The Swedish Competition Authority – along with many other Competition Authorities in the world - believes that cartels can often be found by analyzing procurement data searching for geographical patterns, price similarities, percentage differences between bids and deviations from competitively optimal bids. The Swedish Competition Authority has therefore, during the past few years, used different types of cartel screens on several different markets. The markets under scrutiny have in most cases been identified based on tip-offs which, in their own right, have not been sufficient to launch a formal investigation. Such tip-offs are often received from procuring entities or procurement officials, but also from other informants. Of course the market chosen for screening should also be a type of market where collusion is likely to occur, and one which lends itself to empirical analysis, for instance because public tender data is available to the authority.

We have recently decided to devote even more resources to developing our cartel detection methods. In a project focused solely on cartel detection we are now analyzing a large data base consisting of information from public tenders. The analysis will focus on markets where we have seen competition problems in the past, but where we so far have not received leniency applications or tip-offs

detailed enough to initiate investigations. Of course, we take every opportunity we get to market these initiatives. One of the reasons behind using ex-officio methods to detect cartels is of course to send a message to cartelists not to feel too safe, that even if they don't come to us and apply for leniency we might find them anyway. We therefore put a lot of effort into ex officio work, including talking to people in cartel prone industries, writing articles and training procurers to recognize signs of cartel activity. While sending that message, we also take the opportunity to spread information about disqualification orders, which is the only individual sanction we have and from which an individual can also be granted immunity. Also, when an undertaking is granted immunity from fines, all current employees automatically receive immunity from disqualification orders.

Another way of increasing the risk of detection is to cooperate with procuring authorities. In our opinion, the combination of the two powers competition and public procurement in one authority creates important synergies. The synergies created can be illustrated by the story behind this picture. [Photo of a red and white cottage] At a first glance, this picture shows a very harmless typical red and white Swedish cottage. But, again appearances can be deceiving. To the case handlers at my authority this is not only a cottage, but also a symbol of cartel activity. This is the house where members of a large asphalt cartel met in the beginning of each season to divide the market between them. The winning company in every tender acted as a coordinator and rigged all the other companies' bids. Losers could be compensated with money, or by being allowed to work as sub-contractors.

In my opinion, those ingredients in a cartel highlight the synergies of having procurement and competition in one authority. Back in the heyday of the asphalt cartel, the competition authority was not yet the supervisory body for public procurement and we did not have a leniency program. The asphalt cartel was a nationwide, classic bid-rigging cartel which in many municipalities should have been obvious for procurers, had they had the knowledge and insight to look for signs of cartel activity at an earlier stage. Today, we have access to procurers in a whole other way than we did back then. We can inform them about the procurement rules and at the same time take the opportunity to teach them how to recognize signs of bid rigging and how to make their tenders less prone to bid rigging. Also, the public procurement law expertise that we have within the authority is extremely useful when investigating bid-rigging cartels. An analysis of cartel cases initiated in the past six years and in which we have conducted dawn raids shows that more than half of the cases were based wholly or partially on tip-offs from procurers. That makes them one of the most important categories of informants for the Competition Authority.

Our work in the field of competition and public procurement laws has also brought us in contact with other Government agencies responsible for legislation against corruption, bribery, tax evasion and other unsound behavior. In areas

where firms resort to bid rigging or where illegal direct awards of contracts take place, such behavior seem to be more common. Common to all such practices is that it is often difficult to investigate and take action against violations once they have already occurred. The violations tend to be difficult to identify, securing evidence can be challenging and investigations are often complicated and time consuming. This makes it even more important to effectively prevent unfair business practices by spreading information among trade organizations and undertakings about how we as the responsible Authority interpret and apply the procurement- and competition rules. This is one example of how we work; [\[interactive guidance\]](#) this is an interactive guidance for small and medium sized companies interested in cooperating in a tender auction. By answering questions about whether they are part of the same economic entity or not, are competitors or not and if they have the capacity to place independent bids, the companies can receive guidance if they can probably cooperate in a certain tender, or if they should rather seek legal guidance.

Further, I want to stress that it is not always the private company who is the offender. We also have the power to intervene against public agencies, government, local government or publicly-owned companies in their activities to sell goods or services on commercial markets in competition with private companies. The idea behind this rule is to deal with a problem where private entrepreneurs are being undermined by public bodies and publicly sponsored market activities. One key difference between private and public entities is that public entities do not run the risk of bankruptcy if they fail in the market, and they often benefit from being financed through tax subsidies. Since they operate on the market under different conditions than private competitors, their mere presence on the market often gives rise to market distortions.

Consequently, when public players act in competitive markets there is a risk that market entry by private undertakings is impeded and those active in the market may be driven out, particularly small and medium sized enterprises. Of course, the same risk of being driven out of the market also applies for SMEs trying to face competition from private entities being involved in other unlawful business practices.

My authority is small and needs to prioritize hard when choosing which illegal practices to pursue. All these infringements – cartels, the illegal direct award of contracts, and anti-competitive sales activities by public entities – that I have mentioned in my speech here today are examples of practices liable to cement existing market structures and reduce dynamism, innovation and healthy competition. If we can help to build mutual trust between the public and private sector – by ensuring companies compete fairly for contracts, and are given a fair chance to do so by the public sector – we can help to raise competitiveness for everyone's benefit. Enforcement and advocacy related to those areas are therefore, and will continue to be, a high priority to us.