Robert Moldén

COMPETITION LAW OR THE NEW COMPETITION PRINCIPLE OF PUBLIC PROCUREMENT LAW

WHICH IS THE MORE SUITABLE LEGAL INSTRUMENT FOR MAKING PUBLIC PROCUREMENT MORE PRO-COMPETITIVE?

STOCKHOLM SCHOOL OF ECONOMICS

COMPETITION LAW OR THE NEW COMPETITION PRINCIPLE OF PUBLIC PROCUREMENT LAW

The Court of Justice of the European Union stated already in its Store Baelt landmark judgment in 1993 that effective competition is one of the main purposes of EU public procurement law. This doctoral thesis analyses two different legal instruments as to how well suited they are to make suppliers and contracting authorities act pro-competitively in a procurement context. The overriding research question is whether competition law or the new competition principle of public procurement law is the more suitable legal instrument for making public procurement more pro-competitive.

It is therefore necessary to analyse whether Article 18 (1) of the new EU Classical Sector Public Procurement Directive of 2014, according to which "the design of the procurement shall not be made with the intention … of artificially narrowing competition", constitutes a new general competition principle, in the same sense as the other established EU principles of public procurement, such as the principle of equal treatment.

Since 2007, the Swedish Competition Authority is responsible for enforcing not only competition law but also for enforcing public procurement law.

The primary target reader group for this thesis thus consists of law enforcement officers at the Swedish Competition Authority and other competition and public procurement authorities in the EU Member States. Moreover, the thesis provides an overview over relevant Swedish and EU case law on the interaction between competition and public procurement law which also may be useful for judges and legal practitioners.

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Competition law or the new competition principle of public procurement law

Which is the more suitable legal instrument for making public procurement more pro-competitive?

Robert Moldén

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Competition law or the new competition principle of public procurement law - Which is the more suitable legal instrument for making public procurement more pro-competitive?

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To
Jolanta, Sofie, Julia and Marie

Foreword

This volume is the result of a research project carried out at the Center for Business Law at the Stockholm School of Economics (SSE).

The volume is submitted as a doctoral thesis at SSE. In keeping with the policies of SSE, the author has been entirely free to conduct and present his research in the manner of his choosing as an expression of his own ideas.

SSE is grateful for the financial support provided by the Council for Research Issues at the Swedish Competition Authority, which has made it possible to carry out the project.

Göran Lindqvist

Director of Research
Stockholm School of Economics

Lars Ågren

Head of the
Department of Law and Languages

Abstract

Back in 1993, the Court of Justice of the European Union stated in its judgment in the *Store Baelt Case* that effective competition is one of the main purposes of EU public procurement law. This doctoral thesis analyses two different legal instruments as to how well suited they are to make sellers (i.e. suppliers) and buyers (i.e. contracting authorities) act pro-competitively in a procurement context. The overriding research question is whether competition law or the new competition principle of public procurement law is the more suitable legal instrument for making public procurement more pro-competitive.

As to competition law, it is concluded that competition law is well suited to make suppliers refrain from bid-rigging cartels, anti-competitive information exchange and other anti-competitive cooperation between competitors on the market. However, it is concluded that competition law is not well suited to make contracting authorities act in a pro-competitive way.

Firstly, according to the *FENIN/SELEX* case law of the Court of Justice of the European Union, purchasing activities of contracting authorities are entirely outside the scope of competition law if the goods and services procured are used for non-commercial purposes.

Secondly, anti-competitive effects often occur from the way a contracting authority choses to design a given public procurement proceeding at its own discretion, without agreement or concerted practice with any supplier. Such unilateral action may, in theory, constitute an abuse of a dominant position. However, in practice, it is very rare that a contracting authority enjoys a dominant position as a buyer.

As to public procurement law, it is initially necessary to analyse whether the wording of Article 18 (1) of the EU Classical Sector Public Procurement Directive of 2014, according to which "the design of the procurement shall not be made with the intention … of artificially narrowing competition", constitutes a new general competition principle, in the same sense as the other established EU principles of public procurement, such as the principle of equal treatment.

The existence of such a new competition principle within EU public procurement law is currently contested. It is therefore interesting to notice that the existence of the now well-established principle of equal treatment was also contested before the landmark ruling of the Court of Justice in the *Store Baelt Case* some 30 years ago. The Court actually derived the existence of a principle of equal treatment from the overall purpose of effective competition embodied in the recitals of the EU public procurement directive applicable at that time.

It is concluded that Article 18 (1) of the EU Classical Sector Procurement Directive of 2014, which has been implemented into Swedish law by Chapter 4, Article 2 of the New Swedish Public Procurement Act of 2017, constitutes a new general competition principle. The overall conclusion to the overriding research question is therefore that the new competition principle is a more suitable legal instrument for making public procurement more pro-competitive as to the actions of contracting authorities than the application of competition law is.

However, there are major legal uncertainties, in particular as to the concept of anti-competitive intention as a condition to apply the new general competition principle and the existence of an effects-based framework agreement related competition principle not conditional on any anti-competitive intention. Therefore, it will take a clarifying judgment by the Swedish Supreme Administrative Court and/or the Court of Justice of the European Union to make the new competition principle work not only in theory, but also in practice.

Acknowledgements

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Lund, in particular Tu Thanh Nguyen, Peter Gottschalk, Justin Pierce, Carl Wetter, Robert Ågren, Fredrik Morawetz and Helena Rosén Andersson.

Moreover, I would like to thank my colleagues at the Competition Law and Public Procurement Law Practice Groups at former Gärde Wesslau – now Front Advokater respectively Wesslau Söderqvist for valuable comments and support, in particular Kaisa Adlercreutz, Johan Lidén and Sara Karlsson at Front Advokater, as well as Åke Lewensjö, Hans Nordström, Henrik Nilsson, Cecilia Hesslén, Patricia Jonsell and Pernilla Larsson at Wesslau Söderqvist law firm, as well as Svante Hjertén, Amir Daneshpip and Christian Martinsson at Reuterman law firm and Mohamed Hama Ali at Framtiden.

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This thesis has been part of two research projects financed by the Council for Research Issues at the Swedish Competition Authority, which is gratefully acknowledged. Moreover, I received a research grant from the Max Planck Institute for Comparative and International Private Law for a stay as a guest researcher in Hamburg in November and December 2007, which is also gratefully acknowledged. I am very grateful to the Institute's researchers for valuable advice received during my stay in Hamburg and in particular to Professor Ernst-Joachim Mestmäcker, Professor Jürgen Basedow, Professor Wolfgang Wurmnest, Professor Marian Paschke, Professor Reinhard Zimmermann, Professor Reinhard Ellger, Priv.-Doz. Rainer Kulms, Aristides Kalafatis, Georgios Psaroudakis and Weiheng Zhong. Moreover, I am thankful for the opportunity to present my research project at the Institute's Konzil-meeting in December 2007.

I am also very grateful to Professor Sue Arrowsmith for inviting me to participate at the 6th Public Procurement Research Students' Conference at the University of Nottingham in April 2014 and to present a paper on competition and public procurement reviewed by her and Albert Sánchez Graells.

I also would like to thank all my former teachers in competition law for inspiring me to become a competition lawyer and doctoral candidate, in particular Professor Erik Nerep at the Stockholm School of Economics, Professor Valentine Korah, Professor Ivo Van Bael, Professor Massimo Merola, Professor William Bishop, Professor David O'Keefe and Professor Klaus W. Grewlich at the College of Europe in Bruges.

Most importantly of all, I would like to thank my wife Jolanta and my daughters Sofie, Julia and Marie for putting up with me during the fifteen challenging years I have spent writing this doctoral thesis, which therefore is dedicated to all of them.

Gothenburg, Fourth of July 2021

Robert Moldén

List of abbreviations

AB	Aktiebolag, a Swedish limited liability company
ARC	The German Act against Restrictions of Competition, Gesetz gegen Wettbewerbsbeschränkungen (GWB)
CJEU	Court of Justice of the European Union
EC	European Community
EEA	European Economic Area
EU	European Union
GDP	Gross Domestic Product
LOU	Lag (2016:1145) om offentlig upphandling, the Swedish Public Procurement Act
LUF	Lag (2016:1146) om upphandling inom försörjnings-sektorerna, the Swedish Public Procurement Act in the Utilities Sectors
NCA	National Competition Authority (within the EU member states)
NOU	Nämnden för offentlig upphandling, the former Swedish National Board for Public Procurement
OSL	Offentlighets- och sekretesslag, 2009:400, the Swedish Public Access to Information and Secrecy Act
R&D	Research & Development
SCA	Swedish Competition Authority
TFEU	Treaty on the Functioning of the European Union
US	United States of America

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[1] Moldén's first main licentiate article on *'Mandatory Supply of Interoperability Information: The Microsoft Judgment' (2008) 9 European Business Organization Law Review* 305-334, *see Appendix A.*

[2] Moldén's second licentiate article on 'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective', in Basedow, Jürgen; Francq, Stéphanie and Idot, Laurence (eds), *International Antitrust Litigation – Conflict of Laws and Coordination* (Oxford, Hart Publishing, 2012), 289-314 and 433-434, *see Appendix B.*

[3] Moldén's third main licentiate artide on 'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction' (2012) 15 *Europarättslig Tidskrift* 557-615, *see Appendix C.*

The five debate licentiate articles

PART III – The two new doctoral articles

APPENDIX I: First doctoral article: 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the *Cartes Bancaires* and the *Alfa Quality Moving* landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof' (2018) *21 Europarättslig Tidskrift 593-657*

Part I:
Comprehensive summary of the doctoral thesis

Chapter 1

Introduction: From Information Exchange related to public procurement to The New Competition Principle of the New Public Procurement Directives

1.1. Background, problem and aim of the research project at doctoral level

This doctoral thesis focuses on the interaction between competition and public procurement law. So, what is the basic problem and why is it important to look at public procurement law from a competition angle?

In its new Notice on tools to fight collusion in public procurement published in March 2021, the EU Commission provides the following reason:

"Public procurement is one of the most tangible forms of public spending, as its purpose is to provide works, goods or services that are directly used by citizens (such as a street or an airport, the materials used in a hospital and the public bus services). Public procurement accounts for a substantial share of the GDP of EU Member States, playing a key role in economic growth, social progress and the fulfilment of a State's key objective to provide good quality services to its citizens. Citizens have the right to see public money spent in the most efficient, transparent, accountable and fairest way, to be able to use

quality public services and, ultimately, to continue to place their trust in public institutions."[4]

EU Member States spend approximately 14 % of GDP every year on public procurement, representing approximately 2 000 billion Euro.[5] Sweden spends an even higher percentage on public procurement, approximately 18 % of GDP, which amounts to approximately 77 billion Euro every year.[6]

One obvious purpose of competition law is to increase competition. However, increased competition is not an end in itself. The overriding purpose of competition law is today generally acknowledged to be advancing consumer welfare. In April 2021, the Swedish Competition Authority published a report summarizing the benefits of competition as follows:

"Economic science shows that competition is one way to reach as high welfare and as high economic prosperity as possible. Competition ensures that the benefits of competition are passed on to consumers through lower prices, higher quality, and increased supply. This by making the markets efficient. In an efficient market, goods and services are produced without waste, i.e. production is cost effective. At the same time, the produced goods and services are allocated to where they create the most value, i.e. what is produced is the best possible reflection of consumer demand."[7]

These finding are very much in line with the overall mission of the Swedish Competition Authority as published on its homepage:

"The Swedish Competition Authority is a state authority working to safeguard and increase competition and supervise public procurement in Sweden. Our task is to work for efficient competition in the private and public sectors for the benefit of the consumers as well as for the efficient public procurement for the benefit of the society and the participants in the markets. …

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[4] Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, C(2021) 1631 final, published on 18 March 2021, section 1.1.

[5] Commission Communication, Making Public Procurement work in and for Europe, COM (2017) 572 final, 3 October 2017.

[6] Swedish Competition Authority and the Swedish National Agency for Public Procurement, *Statistik om offentlig upphandling 2020*, Report 2020:5 published on www.kkv.se, page 34.

[7] Swedish Competition Authority, *Konkurrensens positiva effekter*, Research report 2021:1 written by David Sundén and published on the homepage of the Swedish Competition Authority, www.kkv.se., page 7.

The Competition Authority's vision is Welfare through well-functioning markets".[8]

Privately owned companies generally have the purpose to maximize their profits to the benefit of its shareholders. Profits are defined as income minus costs. Profits can thus be increased either by increasing the company's income or by reducing the company's costs. If a privately owned company acts on a competitive market it will be difficult to increase income by price increases as customers would switch over to competing sellers on the market. In such a situation the only feasible way to increase profitability for a privately owned company may be to decrease its costs. For many privately owned companies, the costs of purchasing goods and services from suppliers may therefore constitute a very important parameter of profitability.

One practical example is the car industry. Car producers such as Volkswagen, Volvo or General Motors are specialized in developing and assembling cars. However, the vast majority of car parts are produced by independent car parts suppliers such as Robert Bosch GmbH, Lear Corporation or Autoliv Inc. Moreover, the car industry is characterized by high price competition as to the price of cars charged to consumers. All other things being equal (*ceteris paribus* in the language of economics), a car producer will be the more profitable, the better purchasing conditions it can negotiate with its suppliers. This means that the person managing a car producer's purchasing department is of a very high strategic importance for any car producer.

Take the example of the German car producer Volkswagen AG, which is one of the world's two largest car producers. Volkswagen has a central

[8] Information downloaded from the homepage of the Swedish Competition Authority on 2 May 20021 on https://www.konkurrensverket.se/en/omossmeny/about-us/.

management board consisting of eight members. One of these eight members is Murat Aksel, who in January 2021 was appointed to be responsible for Volkswagen's Purchasing Division, on the homepage of Volkswagen it is stated that his functional responsibility is "Procurement".[9] This constitutes a good example for the strategic importance of purchasing/private procurement for privately owned companies acting on competitive markets.

How can companies obtain good value for money when purchasing goods and services from suppliers? A basic condition for obtaining good value for money is that there is sufficient competition among suppliers. If a company is dependent on a single supplier, the company is very unlikely to obtain good value for many. Therefore, large companies generally try to ensure that they always have a least a second potential supplier by way of dual sourcing.[10] The more effective competition among suppliers a company manages to uphold among its suppliers, the more competitive value for money purchasing conditions it can expect to obtain from its suppliers.

How do large companies' purchasing divisions act in order to promote effective competition among its suppliers? According to a former manager of IT Sourcing at the Swedish company SKF[11], the world's largest producer of rolling bearings, companies often use the following methods in order to promote effective competition between their suppliers:

- Treating all suppliers equally
- Not discriminating foreign suppliers/favouring domestic suppliers

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[9] Downloaded from https://www.volkswagenag.com/en/group/executive-bodies.html on 25 April 2021.

[10] See Spagnolo, Giancarlo, "Public Procurement as a Policy Tool", *in The Cost of Different Goals of Public Procurement* published by the Swedish Competition Authority in 2012, p 29, footnote 5.

[11] Remarks made by the then manager of IT Sourcing at SKF, Christel Pinsén, during her lecture for the Swedish Public Procurement Law Association on "Upphandlingar av tjänst och funktion. Från specification till genomförd leverans" in Gothenburg on 10 June 2014.

- Not putting up unreasonably burdensome requirements (i.e. requirements, that are not proportional to their purpose)
- Always be as transparent as possible to all suppliers
- Apply the same technical requirements in all countries the company operates in

These five points of action are very much in line with the obligations on public procurement officers to follow the following five basic principles of public procurement:

- The principle of equality
- The principle of non-discrimination
- The principle of proportionality
- The principle of transparency
- The principle of mutual recognition

So why would a purchasing department in a private company choose to apply some aspects of these principles of public procurement law voluntarily even if public procurement law is not applicable to them? The simple answer is that a company which treats all its suppliers equally and in a non-discriminatory, proportionate and transparent way while applying the same technical requirements in all countries the company operates in, will be a more attractive business partner and thus attract more potential suppliers. This will lead to more effective competition between the company's suppliers. Again, the more effective competition a company can uphold among its suppliers, the lower cost, better quality or better price-quality it will obtain and the more profitable it will be compared to the company's competitors.

However, while market forces will generally be sufficient to discipline purchasing departments in private companies to act pro-competitively by promoting effective competition among its suppliers, this does generally not

apply to purchasing departments within contracting authorities engaged in public procurement.

Take for example the Swedish Transport Administration, the by far largest Swedish contracting authority.[12] It is the only Swedish Government authority in charge of transport administration. Hence, it is not subject to competition. Moreover, it is to a large extent tax-funded. Its main purpose is not to maximize profit, but to ensure that Sweden has a robust and efficient transport system.[13] This means that there are no market forces in place which would be sufficient to discipline the Swedish Transport Administration, or indeed any other tax-funded contracting authority, to act pro-competitively in a way which will uphold effective competition among its suppliers.

An important reason for obliging contracting authorities to follow public procurement law, and in particular the public procurement principles of equality, non-discrimination, proportionality, transparency and mutual recognition is to create legal incentives for them to behave as if they were a private company. By adhering to these public procurement principles and other provisions of public procurement law, contracting authorities will thus

[12] During 2019, the Swedish Transport Administration (Swedish: Trafikverket) published 671 public procurement proceedings, followed by the City of Stockholm (401 published public procurement proceedings and the City of Gothenburg (321 public procurement proceedings), see p. 75 of the recent report jointly published by the Swedish Competition Authority and the Swedish National Agency for Public Procurement, *Statistik om offentlig upphandling 2020*, Report 2020:5, available on www.kkv.se.

[13] According to information downloaded from its homepage https://www.trafikverket.se/en/startpage/about-us/Trafikverket/ on 2 May 2021, the Swedish Transport Administration has the following vision: "Based on our overall assignment, we have formulated a vision statement that expresses the desired long-term direction for Trafikverket: "Everybody arrives smoothly, the green and safe way." The vision is to act as a guiding principle in planning the operations which means that we will create the prerequisites for a robust and efficient transport system that is energy efficient and safe. At the same time, we ensure that road users and public transport providers have the opportunity to carry out their journeys and provide transportation."

have law-induced incentives to contribute to more effective competition among suppliers. More effective competition also leads to a more efficient allocation of production resources in the economy, which benefits society as a whole.[14]

When the Swedish Competition Authority was founded in 1992, it was responsible for enforcing competition law only. Since 2007, the Swedish Competition Authority is responsible for enforcing not only competition law but also for enforcing public procurement law. This means that the Authority must decide on how to prioritize between enforcement of competition law and public procurement law, as set out in its current Prioritisation Policy for Enforcement Activities as follows:

> "We focus on investigating matters which are of general interest and which will lead to clear results. Our aim is always to promote effective competition in the private and public sectors for the benefit of consumers, as well as to promote an effective public procurement process for the benefit of the general public and market participants. The Swedish Competition Authority fulfils different functions with regard to the enforcement of the competition and procurement rules. This is reflected in the policy, which is divided into two parts. The two sections contain explanations of our priorities in our respective enforcement areas."[15]

In a procurement context, the Swedish Competition Authority thus has two alternative legal instruments at its disposal in order to promote effective competition: competition law and public procurement law (and in particular the new competition principle of public procurement law). The aim of this thesis is to analyse which of these two legal instruments is more suitable to

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[14] For a discussion of efficient resource allocation as the overriding economic goal of EU public procurement law, see p. 7 of the recent report on "Nationalekonomiska aspekter vid upphandling av kvalitet" written by professor Mats Bergman and commissioned by the Swedish National Agency for Public Procurement and published on its website in March 2021 (https://www.upphandlingsmyndigheten.se/globalassets/dokument/publikationer/nationalekonomiska-aspekter-vid-upphandling-av-kvalitet.pdf)

[15] The Swedish Competition Authority's Prioritisation Policy for Enforcement Activities of 12 February 2020 (Dnr 581/2019), p. 1.

make sellers (i.e. suppliers) and buyers (i.e. contracting authorities) act pro-competitively in a procurement context. The overriding research question is whether competition law or the new competition principle of public procurement law is the more suitable legal instrument for making public procurement more pro-competitive, see section 3.3 below.

Hence, the primary target reader group for this thesis consists of law enforcement officers at the Swedish Competition Authority and other competition and public procurement authorities in the EU Member States. Moreover, I hope that the thesis will be useful for legislators, judges and practitioners of EU competition and public procurement law. The three most important articles of this consolidated thesis have been published in the leading Swedish journal of EU law, Europarättslig Tidskrift, whose readers are generally very familiar with EU law in general and EU competition law and EU public procurement law in particular. In order to fully benefit from reading this thesis, good prior knowledge of EU law in general or good knowledge of EU competition law and EU public procurement law is required.

If this thesis had been written in the monograph format, it would have been possible to include several introductory chapters to provide the reader with a basic introduction of important concepts of both competition law and public procurement law. This is not possible within the compilation thesis format I have chosen for this thesis. However, the area of anti-competitive information exchange constitutes a rather new area of competition law, which may not be familiar even to readers with a good general understanding of competition law. Therefore, I have included a brief introductory section

1.3 below, where some basic concepts of anti-competitive information exchange are set out in general and in particular related to public procurement.

One aim of the present comprehensive summary is to set out the interconnection between the current research project at doctorate level and the initial research project on anti-competitive information exchange initiated 15 years ago, see the subsequent section 1.2.

Readers who are already familiar with my research project at licentiate level and would like to focus on the results of my current research project at doctorate level are advised to focus on reading chapter 9 and onwards of this comprehensive summary.

1.2. Interconnection between the present research project at doctoral level and the initial research project on anti-competitive information exchange initiated 15 years ago

I started to work on this research project 15 years ago, after being hired by the Swedish Competition Authority in spring 2006. Soon after joining the Authority, I happened to get involved in several case investigations concerning an area of competition law, which at that time was new to me – anti-competitive information exchange. In particular, I became a member of the team led by Mikael Ingemarsson conducting a sector enquiry into how 479 Swedish trade associations were operating different forms of information exchange between their members.[16]

[16] Swedish Competition Authority, *Samarbeten inom branschorganisationer*, published in the Reports Series of the Swedish Competition Authority, 2008:1.

In autumn 2006, the Swedish Competition Authority organised a one day conference on The Pros and Cons of Information Sharing, where I had the opportunity to assist the then director general, Claes Norgren, in doing legal research for his speech at the conference. During the conference, I happened to be seated next to Hans Henrik Lidgard, professor in competition law at the University of Lund. At a certain moment, I took the chance to ask him whether he thought it would be a good idea for me to apply to be accepted as a doctoral candidate writing about that day's conference topic - information exchange. Yes indeed, he replied.

Half a year later, in June 2007, I was accepted as a doctoral candidate with Hans Henrik Lidgard as my first supervisor. The title of my original research project at licentiate level funded by the Council for Research Issues at the Swedish Competition Authority was "Information Exchange – When does too much transparency get anti-competitive?". The research grant financed a 50 % employment as a doctoral candidate during three years, while I kept on working 50 % at the Swedish Competition Authority.

In early 2016, I left the University of Lund to become a doctoral candidate at the Stockholm School of Economics, almost twenty years after obtaining my master degree in Economics at the Stockholm School of Economics.

In December 2016, I presented my licentiate thesis on *Competition and Public Procurement – With Special Focus on Pro-competitive and Anti-competitive Information Exchange as well as the New Competition Principle of the New EU Public Procurement Directives* at the Stockholm School of Economics.[17]

When I started to work on my original research project in 2006, my initial focus was on EU and Swedish competition law related to anti-competitive information exchange. I soon realized that the issue of anti-competitive information exchange is of particular relevance in the area of public procurement.

From October 2008 to March 2009, I was on leave from the Swedish Competition Authority in order to serve as an associate judge at the Gothenburg Administrative Court of Appeal. While I wrote a few judgments in tax law, Swedish municipal law and EU State Aid Law, the vast majority of my judgments concerned EU and Swedish public procurement law. Several of these judgments related to the interaction between public procurement law and competition law[18] and one judgment concerned the overriding issue of whether there is a competition principle in EU and Swedish public procurement law.[19] My practical experience as a judge in this regard contributed to shifting the focus of my research from anti-competitive information exchange in general to anti-competitive information exchange related to public

[17] Moldén's licentiate thesis on *Competition and Public Procurement – With Special Focus on Pro-competitive and Anti-competitive Information Exchange as well as the New Competition Principle of the New EU Public Procurement Directives*, presented at the Stockholm School of Economics in December 2016.

[18] See, for example, the *Table-top Case* of 2009 presented in section 12.5 below.

[19] See the *Nursing Home Case* of 2009 presented in section 12.4 below.

procurement. Moreover, I got more interested in the interaction of competition law and public procurement law, in particular as to the issue of whether there is a competition principle in EU and Swedish Public Procurement law.

In 2011, I left the Swedish Competition Authority in order to work as a competition and public procurement law expert at the Gothenburg office of the Swedish law firm Gärde Wesslau, which in 2016 changed its name to Front Advokater. In 2018, I had the opportunity to act as counsel in a public procurement law case, where the Stockholm Administrative Court became, as far as I know, the first Swedish court to reaffirm the new provisions of Chapter 4, Article (2) of the new Swedish Public Procurement Act as to the existence of a new competition principle.[20]

The most important factor for shifting the focus of my research project towards the competition principle has of course been the enactment of the new EU Classical Sector Directive of 2014. Article 18 of this Directive titled "Principles of procurement" contains the following wording which arguably may constitute a new general competition principle in EU public procurement law: "The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition." This new provision has then been implemented into Swedish law by Chapter 4, Article 2 of the new Swedish Public Procurement Act, which entered into force on 1 January 2017.

In 2017, I was awarded a second research grant from the Council for Research Issues at the Swedish Competition Authority. The title of the new research project at doctoral level partly financed by the Swedish Competition

[20] See the *Carballos Klinic Case* of 2018, presented in section 12.12 below.

Authority has been "The New Competition Principle in the EU Public Procurement Directives of 2014 as well as the New Swedish Public Procurement Act of 2017".

The overriding research question of my thesis at doctoral level set out in section 3.3 below follows directly from the title of my thesis at doctoral level: Competition law or the new competition principle of public procurement law – Which is the more suitable legal instrument for making public procurement more pro-competitive?

1.3. A brief introduction to how information exchange can harm competition – in general and when related to public procurement

During my five years at the Swedish Competition Authority, I had the opportunity to provide several case teams working with cases of anti-competitive information exchange with a basic introduction to the state of law regarding anti-competitive information exchange. I have also had the opportunity to teach undergraduate und postgraduate students at the Universities of Stockholm, Lund and Rome on anti-competitive information exchange. I have always started my lectures with the same practical case study to illustrate the potential harmful effects of information exchange, as follows:

Imagine that you are the CEO of a major company in the widget industry and that you are sitting in the classical smoke-filled room together with the CEOs of the other major widget producers in Sweden. The meeting constitutes a board meeting of the Swedish Widget Trade Association and the of-

ficial topic on the agenda is what steps the trade association should take towards making the production of widgets more environmental-friendly. Suddenly, the CEO of Company A reveals that she is going to increase her prices for widgets by 10 % next day and asks the other CEOs if they could commit themselves to also increase their prices by 10 % . Having studied antitrust law, you immediately react, denouncing this as a proposal to engage in an obviously illegal cartel agreement and you threaten to immediately leave the meeting if this discussion is not directly terminated. Fine, says the CEO of Company A, I am not longer proposing you to agree on any price increase, as this indeed may constitute an illegal price cartel. So, I am only informing you that Company A will increase its prices for widgets by 10 % as of tomorrow. Thanks for the information, says CEO of Company B. I can also inform you that we at Company B will increase our prices by 10 %, he adds politely. And so it continues, until each of the participating CEOs have informed each other of their respective planned price increase of 10 % the next day.

How would you analyse this information exchange under competition law? There is now only an exchange of information between participants, so there is no longer any cartel agreement to increase prices. However, the practical effects of this information exchange could be the same as if there was an agreement. By exchanging this information, strategic uncertainty as to the competitors' actions will diminish and the effects of the information exchange may actually be a price increase of 10 % in the same way as if there had been a cartel agreement. This is the basic reason why the concerted practice of information exchange can harm competition in a similar way as a cartel agreement, as set out in the next section of this Introduction.

We live in what is often referred to as the information society, which means that consumers easily can find information and compare prices of different firms using the Internet. A certain level of market transparency is necessary for price competition to occur. In fact, one of the prerequisites for effective competition is that consumers can compare prices of competing firms.

Does this mean that increased market transparency always leads to increased competition? Economic research has shown that this is not always the case. As set out below, information exchange and the resulting increase in market transparency can even lead to a restriction of competition. One explanation for this phenomenon is so-called hidden competition. If a company active on an oligopolistic market decreases its price compared to its competitors, the company would normally expect to increase its relative market share. However, when market transparency is very high, competitors will immediately follow suit and lower their prices as well. This means that the original price decrease will not have any effect on the companies' relative market shares; it will only lead to lower profitability for all of the companies. Companies will then be disincentivised from competing on price.

A certain level of uncertainty as to the competitors' prices may sometimes be necessary in order to ensure effective competition. An illustrative empiric study on the potentially anti-competitive effects of information exchange initiated by public authorities is the Danish *Ready-mixed Concrete* case[21]. In the beginning of the 1990s, the Danish Competition Authority received information concerning competition problems in the ready-mixed concrete

[21] Møllgaard, Peter and Baltzer Overgaard, Per, 'Transparency and competition policy', in Bergman, Mats (ed), *The Pros and Cons of Information Exchange* (Stockholm, 2006), 112-114, available on www.kkv.se.

industry. Persistent rumours of large individualised secret discounts were particularly disturbing. At that time, the competition legislation in Denmark prescribed improved transparency as the prime weapon against anti-competitive behaviour. Hence, the Danish Competition Authority decided to gather and publish firm-specific transaction prices for two grades of ready-mixed concrete in three regions of Denmark. By doing so, the Danish Competition Authority hoped to inform customers of bargain deals and expected them to take a tougher stand in subsequent negotiations. However, following the initial publication of this information, average prices increased by 15–20 per cent within a year in the Aarhus region. Improved transparency seemed to have led to improved coordination of the pricing policies: after a year of publication, the initial price dispersion had disappeared altogether. Further evidence suggested that average prices increased because firms stopped granting large individualised discounts. The likely reason was that the improved transparency made deviations from the collusive agreement visible and so the firms simply stopped granting discounts. The case illustrates that if firms can react to information before it can be exploited by buyers, this can lead to buyers being harmed rather than helped by increased price transparency.

A more recent example of competition authority action to increase price transparency is the Market Transparency Unit for Fuels, which since 2013 is operated by the German Bundeskartellamt. Since 1 August 2013, companies which operate petrol stations or have the power to set their prices are obliged to report price changes for the most commonly used types of fuel - Super E5, Super E10 and Diesel - in real time to the Market Transparency Unit for Fuels. This then passes on the incoming price data to consumer information

service providers, which in turn pass it on to the consumer.[22] This service obviously leads to a very high price transparency for consumers. However, in my view, it is by no way sure that this artificially increased almost perfect market transparency really will lead to lower prices for the consumer, as the high market transparency actually may decrease the incentives for fuel sellers to compete aggressively on price.

Anti-competitive information exchange between competitors constitutes an area of competition law which has been under increased scrutiny by European competition authorities during recent 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.[23]

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 and auxiliary to a 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 (*i.e.* offering somewhat lower prices than the agreed cartel price for instance by offering secret rebates) is thus likely to occur and without an effective monitoring device in place, most cartels would quickly erode.

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[22] The homepage of the German Market Transparency Unit for Fuels is https://www.bundeskartellamt.de/EN/Economicsectors/MineralOil/MTU-Fuels/mtufuels_node.html

[23] Guidelines on the applicability of Artide 101 of the TFEU to horizontal co-operation agreements [2011] OJ11/1 (The Horizontal Guidelines).

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.[24]

What about members of a bid-rigging cartel related to a public procurement proceeding? To what extent do they need to hire consultancy firms or find other ways to monitor that the cartel members comply with the cartel agreement with regard to a specific public procurement proceeding?

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, *i.e.* to offer a lower price than the agreed cartel price, 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 the contracting authority on the total price offered by the winning tenderer.[25] 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

[24] 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)

[25] The right to obtain information on the winning tenderer's total price has recently been reconfirmed by the judgment of the Göteborg Administrative Court of Appeal on 25 September 2020 in Case 4692-20, *Skop-Analys AB* v *City of Landskrona*.

in general. This is also a reason for why it makes sense to analyse information exchange related to public procurement as a specific area of legal research.

(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, also non-reciprocal transfer of strategic information from one undertaking to another may be sufficient to trigger competition law. Information related to prices and quantities are generally seen as the most strategic, but also other information concerning, *e.g.* costs, demand and marketing plans may be considered strategic as set out by the European Commission in its Horizontal Guidelines.[26]

In public procurement, tenderers are normally required to submit a large amount of information on the tendering 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.

1.4. Structure of the consolidated thesis at licentiate and doctoral level

Like most of the doctoral theses presented at the Stockholm School of Economics - outside the area of law where most theses presented so far have

[26] Guidelines on the applicability of Artide 101 of the TFEU to horizontal co-operation agreements [2011] OJ11/1 (The Horizontal Guidelines), para. 86.

been monographs - this thesis constitutes a compilation thesis. This consolidated doctoral thesis consists of five main articles, five short debate articles as well as the present comprehensive summary.

The first three main articles as well as the five debate articles - collectively referred to as the thesis at licentiate level - have been part of the licentiate thesis[27] presented in December 2016 at the Stockholm School of Economics and form an integral part of the present doctoral thesis.

The last two main articles published after the licentiate thesis was presented are, together with the present comprehensive summary, collectively referred to as the thesis at doctoral level.

The original five basic research questions analysed at licentiate level will be presented in chapter 2 below.

Two of the five basic research questions, which have been analysed in-depth at doctoral level, are presented in section 3.1 and 3.2 below. As set out above, the overriding research question of this thesis at doctoral level is "Competition law or the new competition principle of public procurement law – Which is the more suitable legal instrument for making public procurement more pro-competitive?" This overriding research question will be presented in section 3.3 below.

The legal dogmatic method applied in this thesis will be presented in chapter 4 below. This chapter also contains a presentation of the legal materials concerning EU and Swedish competition law as well as EU and Swedish public procurement law which have been analysed in this thesis.

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[27] Moldén's licentiate thesis on *Competition and Public Procurement – With Special Focus on Pro-competitive and Anti-competitive Information Exchange as well as the New Competition Principle of the New EU Public Procurement Directives*, presented at the Stockholm School of Economics in December 2016.

The three main licentiate articles will be presented in chapter 5 and the five debate licentiate articles on the new competition principle will be presented in chapter 6. The two new doctoral articles will be presented in chapter 7.

The conclusions related to the first three basic research questions, which have been analysed at licentiate level only, will be presented in chapter 8. The conclusions related to the first doctoral basic research question will be presented in chapter 9 and the conclusions related to the second doctoral basic research question will be presented in chapter 10. The conclusions related to the overriding research question at doctoral level will be presented in chapter 11. Then, thirteen practical examples of the potential impact on future case law of acknowledging the new competition principle in public procurement law will be presented in chapter 12. While my thesis focuses on the fundamental *de lege lata* question whether there is a new competition principle in EU and Swedish public procurement law, my articles written at both licentiate and doctoral level include a number of concrete *de lege ferenda* proposals directed towards the Swedish legislator as well as towards the Swedish Supreme Administrative Court as to what it takes to make the competition principle work not only in theory, but also in practice. My five most important proposals are summarized in the chapter 13, which constitutes the final chapter of this comprehensive summary.

The present comprehensive summary (Swedish: kappa) constitutes Part I of this consolidated thesis.

The first three main licentiate articles and the subsequent five debate licentiate articles on the new competition principle, which have been part of

my licentiate thesis [28] presented in December 2016, constitute Part II of this consolidated thesis, see *Appendices A-H*.

Finally, the two new doctoral articles, *Appendices I-J*, constitute Part III of this consolidated thesis.

[28] Moldén, Robert, *Competition and Public Procurement – With Special Focus on Pro-competitive and Anti-competitive Information Exchange as well as the New Competition Principle of the New EU Public Procurement Directives*, licentiate dissertation presented at the Stockholm School of Economics in December 2016.

Chapter 2

The original five basic research questions at licentiate level

Although most of the articles in this consolidated thesis relate to the adverse effects on competition of information exchange, it should from the outset be borne in mind that information exchange often has positive economic effects. Access to information concerning its competitors' actions will in fact make a company's planning of, *e.g.* future production and marketing activities more effective.[29]

Most infringements of competition law involve information exchange in some way or another. In order to study particularly interesting aspects of information exchange more in-depth, it was therefore necessary to define suitable delimitations regarding which aspects of information exchange to include respectively exclude from the scope of this thesis.

Most prior research concerning anti-competitive information exchange has been conducted as to information exchange between competing com-

[29] For a list of positive effects of information exchange, see Bergman, Mats, 'Introduction', in Bergman, Mats (ed), *The Pros and Cons of Information Exchange* (Stockholm, 2006), 11, available on www.kkv.se.

panies where the companies themselves have initiated the information exchange.[30] The most important delimitation of this thesis is that it does *not* deal with this kind of information exchange. Instead, this thesis focuses on information exchange initiated by public authorities, either in relation to a public procurement proceeding or through other means.

This thesis does not have the ambition to cover all aspects of information exchange related to public procurement or otherwise initiated by public authorities. Instead, a limited number of aspects have been chosen to be studied more in-depth. Instead of writing one comprehensive monograph, I have opted for a compilation thesis, in which the first two published articles focus on two very distinct aspects regarding information exchange. The first main licentiate article focuses on mandatory supply of interoperability information ordered by the Court of Justice of the European Union in the *Microsoft* case[31], and the second licentiate article focuses on exchange of information and opinions between European competition authorities and courts under EU procedural competition law.[32]

One of the most interesting competition aspects of public procurement is the information exchange embodied in public procurement related to the high transparency achieved by public procurement procedures. However,

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[30] In particular, just two years before starting my research project, a very comprehensive doctoral thesis had been published, analysing in-depth the state of EU law as to information exchange initiated by the companies themselves, see Wagner-von Papp, Florian, *Marktinformationsverfahren: Grenzen der Information im Wettbewerb – Die Herstellung praktischer Konkordanz zwischen legitimen Informations-bedürfnissen und Geheimnettbewerb*, doctoral thesis presented at the University of Tübingen (Baden-Baden, Nomos Verlagsgesellschaft, 2004).

[31] Moldén's first main licentiate artide on *'Mandatory Supply of Interoperability Information: The Microsoft Judgment' (2008) 9 European Business Organization Law Review* 305-334, *see Appendix A.*

[32] Moldén's second main licentiate artide on 'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective', in Basedow, Jürgen; Francq, Stéphanie and Idot, Laurence (eds), *International Antitrust Litigation – Conflict of Laws and Coordination* (Oxford, Hart Publishing, 2012), 289-314 and 433-434, *see Appendix B.*

when analysing the interaction of competition and public procurement I do not only consider anti-competitive information exchange related to public procurement. I also look at a number of other examples of interaction between competition law and public procurement law as set out in the third main licentiate article.[33] One important aim of the thesis at licentiate level was to explore the role of competition within public procurement law, in particular as to the new competition principle (a principle to be analysed much more in depth at doctoral level, as set out in section 3.3 below).

As set out above, the thesis at licentiate level thus covered the following five original basic research questions:

Information exchange initiated by public authorities by other means than public procurement

1. What is the state of law regarding mandatory supply of interoperability information?
2. What is the state of law regarding exchange of information between competition authorities and courts?

Information exchange related to public procurement

3. What is the state of law regarding protection of sensitive information in public procurement proceedings?
4. What is the state of law regarding information exchange and bid-rigging cartels?
5. What is the state of law regarding the role of competition in public procurement law and in particular the new competition principle?

[33] Moldén's third main licentiate artide on 'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction' (2012) 15 *Europarättslig Tidskrift* 557-615, *see Appendix C.*

Chapter 3

The two remaining basic research questions and the new overriding research question at doctoral level

As set out in section 3.3 below, the overriding research question at doctoral level is "Competition law or the new competition principle of public procurement law – which is the more suitable legal instrument for making public procurement more pro-competitive".

As set out above, the thesis at licentiate level covered five basic research questions. At doctoral level, I have decided to keep just those two basic research questions which are closely related to the new overriding research question at doctoral level and to analyse these two basic research questions considerably more in-depth than at licentiate level.

In order to create the necessary space for in-depth analysis at the doctoral thesis, the following three basic research questions of the licentiate thesis have thus *not* been developed further at doctoral level:

1. What is the state of law regarding mandatory supply of interoperability information?
2. What is the state of law regarding exchange of information between competition authorities and courts?
3. What is the state of law regarding protection of sensitive information in public procurement proceedings?

The first two research questions at licentiate level (concerning mandatory supply of interoperability information and exchange of information between competition authorities and courts) both belong to the area of information exchange initiated by public authorities by other means than public procurement. Moreover, both research questions concern examples of information exchange where the exchange of information is not anti-competitive but instead positive for competition. By excluding these two search questions from further research, I can thus narrow down the scope of the in-depth analysis at doctoral level to such information exchange which is related to public procurement and which is detrimental to competition.

The third research question at licentiate level (concerning the protection of sensitive information in public procurement proceedings) is of course related to public procurement. However, this research question relates to the interaction between public procurement law and the Swedish Public Access to Information and Secrecy Act. By excluding also this third research question from further research, I can focus exclusively on the interaction between competition law and public procurement law at doctoral level.

Hence, the doctoral thesis is based on in-depth analysis of the following remaining two research questions which are closely related to the overriding research question at doctoral level and which earlier were analysed as the fourth, respectively fifth basic research question at licentiate level:

1. What is the state of law regarding Information Exchange and Bid-rigging Cartels?

2. What is the state of law regarding the Role of Competition in Public Procurement Law and in particular the New Competition Principle?

3.1. The first remaining basic research question at doctoral level: What is the state of law regarding Information Exchange and Bid-rigging Cartels?[34]

This first doctoral research question is analysed in-depth in my first doctoral article on "Bid-rigging and Public Procurement Related Information Exchange" (Appendix I). This article focuses on EU and Swedish competition law.

3.2. The second remaining basic research question at doctoral level: What is the state of law regarding the role of competition in public procurement law and in particular the new competition principle?[35]

This second doctoral research question is analysed in-depth in my second doctoral article on "The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective" (Appendix J). This article focuses mainly on EU and Swedish public procurement law.

[34] Corresponds to the fourth research question at licentiate level.
[35] Corresponds to the fifth research question at licentiate level.

3.3. The new overriding research question at doctoral level: Competition law or the new competition principle of public procurement law – which is the more suitable legal instrument for making public procurement more pro-competitive?

The overriding research question at doctoral level is: "Competition law or the new competition principle of public procurement law – which is the more suitable legal instrument for making public procurement more pro-competitive".

In order to determine whether competition law or the new competition principle of public procurement law is the more suitable legal instrument for making public procurement more competitive, it is firstly necessary to analyse how competition law applies to public procurement. The application of competition law to actions by bidders is analysed in my first doctoral article, section 2 titled "Bid-rigging cartels and joint bidding related to public procurement". The application of competition law to actions by contracting authorities is analysed in my second doctoral article, in section 2 titled "Competition impact on public procurement by way of competition law applicable to contracting authorities when procuring".

Secondly, it is necessary to analyse if, and if yes, how the competition principle can be applied on actions by contracting authorities. This is analysed in the second doctoral article, in section 6, titled "Competition impact on public procurement directly through the framework agreement related competition principle enacted in the former classical sector directive of

2004" as well as in section 7 titled "Competition impact on public procurement directly through the new general competition principle enacted by the 2014 public procurement directives".

The legal basis for the new general competition principle is Article 18 (1) of the New Classical Sector Directive of 2014, which provides as follows:

> "**The design of the procurement shall not be made with the intention** of excluding it from the scope of this Directive or **of artificially narrowing competition**. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators." (emphasis added)

Article 18 (1) of the New Classical Sector Directive is implemented by the following provision enacted in Chapter 4, Article 2 of the New LOU of 2017:

> **"Public procurement principles"**
>
> Contracting authorities shall treat suppliers equally and without discrimination and shall conduct procurements in a transparent manner. Further, procurements shall be conducted in accordance with the principles of mutual recognition and proportionality.
>
> **The design of a procurement shall not be made with the intention of excluding it from the scope of this Act, nor shall it be made with the intention of limiting competition so that certain suppliers are unduly favoured or disadvantaged."** (emphasis added)

It is contested whether these provisions actually constitute a new competition principle under EU and Swedish public procurement law.

If you search for "public procurement" on the website of the Swedish Competition Authority, you will find the following text on the purpose of public procurement legislation:

"Each year, the public sector makes purchases for an estimated SEK 683 billion. To ensure that tax monies are used in the best way possible, and to safeguard competition on the market, authorities must observe certain rules when performing procurements."

If you then click on "Basic principles for public procurement" you will find the following information:

"All legislation governing public procurement rests on five basic principles. The provisions in the procurement acts should always be interpreted with these taken into account."[36]

Thereafter, the following five fundamental principles for public procurement are mentioned: Non-discrimination, Equal treatment, Proportionality, Transparency and Mutual recognition.

It can therefore be noted that the competition principle is currently not mentioned among the principles of public procurement on the website of the Swedish Competition Authority.

However, it is interesting to note that when I accessed the same website on 1 January 2017, on the very day the New LOU of 2017 entered into force, the list of basic principles for public procurement did include the new competition principle. The text of the website in this regard was on 1 January 2017:

[36] http://www.konkurrensverket.se/en/publicprocurement/about-the-legislation/basic-principles-for-public-procurement/ , accessed on 2 May 2021. According to the information on the website the most recent update of this text was made on 24 October 2018.

"**Competition**
The competition principle means that the design of a procurement shall not be made with the intention of limiting competition so that certain suppliers are unduly favoured or disadvantaged." (my translation, emphasis added)"[37]

Hence, the Swedish Competition Authority does not (any longer) seem to acknowledge competition as a principle of public procurement in the same way as it acknowledges other public procurement principles such as equal treatment and transparency.

Another example for the new competition principle being contested is the conclusion made by Dorthe Kristensen Balshøj in her disputation, according to which "competition plays a major role in procurement, but … there is no such thing as a competition principle"[38]

Hence, an important part of the analysis in this thesis concerns the fundamental question whether Article 18 (1) of the New Classical Sector Directive of 2014 as implemented by Chapter 4, Article 2 of the New LOU of 2017 established a new general competition principle in public procurement law.

Only if it is established that there is indeed a new competition principle it is possible, subsequently to analyse whether such a competition principle of public procurement law is more or less suitable than competition law for making public procurement more pro-competitive.

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[37] The original Swedish version reads as follows: "Konkurrens: Konkurrensprincipen innebär att en upphandling inte får utformas i syfte att begränsa konkurrensen så att vissa leverantörer gynnas eller missgynnas på ett otillbörligt sätt".

[38] Dorthe Kristensen Balshøj, Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context, doctoral dissertation presented in 2017 at Aarhus University, p. 67.

Chapter 4

Method, materials and delimitations

This thesis on EU and Swedish competition law as well on EU and Swedish public procurement law is based on the legal dogmatic method.

Before discussing some practical aspects on how I have applied the legal dogmatic method in section 4.4 below, I would first like to briefly present the most relevant legislation related to EU and Swedish public procurement law as well as EU and Swedish competition law analysed in this thesis, see sections 4.1 and 4.2 below. Then I would like to present some of the most significant differences between the traditional Swedish legal dogmatic method applied in areas of Swedish law not influenced by EU law and the legal dogmatic method applied in EU Competition law and EU public procurement law, see section 4.3 below.

4.1. Overview over Swedish and EU public procurement legislation analysed in this thesis

Swedish public procurement in the classical sector is governed by the new Swedish Public Procurement Act which entered into force on 1 January 2017. In this thesis, the Act will be referred to as the *New LOU of 2017*, where LOU is the established Swedish abbreviation for "Lag (2016:1145) om offentlig upphandling".[39] The New LOU implements the new Directive 2014/24/EU concerning public procurement in the classical sector.[40] In this thesis, this Directive will be referred to as the *New Classical Sector Directive of 2014*. Until 31 December 2016, Swedish public procurement in the classical sector was governed by "Lag (2007:1091) om offentlig upphandling", hereafter referred to as the *Former LOU of 2008*. It implemented the preceding Directive 2004/18/EC concerning the coordination of award procedures in the classical sector, hereafter referred to as the Former *Classical Sector Directive of 2004*.

Swedish public procurement in the utilities sector is governed by the Swedish Public Procurement Act in the Utilities Sectors. In this thesis, the Act will be referred to as the *New LUF of 2017*, where LUF is the established Swedish abbreviation for "Lag (2016:1146) om upphandling inom försörjningssektorerna".

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[39] The Swedish Competition Authority has published a non-official translation of LOU into English, which is used in this artide and can be downloaded under: http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/swedish-public-procurement-act.pdf.

[40] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

The New LUF of 2017 implements Directive 2014/25/EU conceming public procurement in the Utilities sectors.[41] In this thesis, this Directive will be referred to as the *New Utilities Sector Directive of 2014*. Until 31 December 2016, Swedish public procurement in the utilities sector was governed by "Lag (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster", hereafter referred to as the *Former LUF of 2008*. It implemented the preceding Directive 2004/17/EC coordinating the procurement procedures in the in the utilities sector, hereafter referred to as the *Former Utilities Sector Directive of 2004*.

The new Swedish Concessions Procurement Act[42] of 2017 and the Swedish Defence and Security Procurement Act[43] will not be analysed in this thesis, which constitute important delimitations.

4.2. Overview over Swedish and EU competition law legislation analysed in this thesis

[41] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

[42] "Lag (2016:1147) om upphandling av koncessioner", implementing Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

[43] "Lag (2011:1029) om Upphandling på försvars- och säkerhetsområdet"), implementing Directive 2009/81/EU of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

Swedish competition law is governed by the *Swedish Competition Act of 2008*[44] containing provisions prohibiting anti-competitive agreements and abuse of a dominant position, which constitute copies of Articles 101 and 102 TFEU. According to the preparatory works behind the preceding Competition Act, The Swedish Competition Act of 1993, Konkurrenslagen (1993:20), 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 practice and jurisprudence of the Court of Justice can, and was at the outset intended to serve as guidance when interpreting the Swedish Competition Act.[45] The Swedish Supreme Court has, in a case concerning the existence of a dominant position,[46] 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 effectuated 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).[47] In the majority of competition cases handled by the Swedish Competition Authority, the procedure is very similar

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[44] 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 is used in this artide and can be downloaded under: http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-swedish-competition-rules--an-introduction.pdf. The Swedish Competition Authority has also published a non-official translation into English of the Swedish Competition Act, which can be downloaded under: http://www.konkurrensverket.se/globalassets/english/competition/the-swedish-competition-act.pdf

[45] See prop. 1992/93:56, p. 21.

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

[47] In September 2007, the enforcement activities as well as information activities of the Swedish National Board for Public Procurement (Nämnden för offentlig upphandling – NOU) were transferred

to that of the European 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[48] as well as 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.[49] Moreover, the Swedish Competition Authority is entitled to take decisions making voluntary commitments mandatory, under threat of penalty payments.[50] Since January 2018, the Authority in entitled to adopt decisions prohibiting a merger[51]. These decisions by the Swedish Competition Authority can be appealed to the Swedish Patent and Market Court at the Stockholm District Court.[52]

A peculiarity of Swedish procedural competition law has previously been that the Swedish Competition Authority did not have the authority to take mandatory decisions on its own to impose fines for breaches of Swedish or EU competition law. In these cases, the Swedish Competition Authority had to start proceedings against the undertakings involved at the Swedish Patent and Market Court at the Stockholm District Court. It was

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to the Swedish Competition Authority, www.kkv.se. On 1 September 2015, the information activities were transferred from the Swedish Competition Authority to a new National Agency for Public Procurement (Upphandlingsmyndigheten), www.upphandlingsmyndigheten.se. However, the responsibility for enforcing public procurement law has remained with the Swedish Competition Authority.

[48] Chapter 3, Artides 1 and 3 of the Swedish Competition Act.

[49] Chapter 3, Artide 1 and Chapter 6, Artide 1 of the Swedish Competition Act.

[50] Chapter 3, Artide 4 and Chapter 6, Artide 1 (3) of the Swedish Competition Act.

[51] Chapter 4, Artide 1 of the Swedish Competition Act.

[52] Chapter 7, Artide 1 of the Swedish Competition Act.

thus the Swedish Patent and Market Court which had the authority to impose a fine, as a first instance court. However, as of 1 March 2021, the Swedish Competition Authority now also has the authority to take decisions imposing fines.[53]

The judgments of the Swedish Patent and Market Court can only be appealed to the Swedish Patent and Market Court of Appeal at the Svea Court of Appeal.[54] The general rule is that a further appeal to the Swedish Supreme Court is not possible. The Swedish Act on Patent and Market Courts of 2016[55] does allow exceptions from this rule, however, only when the Swedish Patent and Market Court of Appeal deems such an appeal to be needed. According to the preparatory works behind the Act on Patent and Market Courts of 2016, an appeal to the Swedish Supreme Court could come into question only if there is a general need for a more overarching precedent where other areas of law come into play as well.[56] There are no known judgments that have been successfully appealed to the Swedish Supreme Court under this regulation yet.

The Swedish/EU competition and public procurement legislation which constitutes the basic material for this thesis applying the legal dogmatic method is listed in section 15.1 and official documents in section 15.2. The judgments of Swedish and EU courts which are analysed in this thesis are listed in section 14. As to legal literature, articles are listed in section 15.3, books in section 15.4 and other publications in section 15.5.

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[53] Chapter 3, Artide 1 a and Chapter 3, Artide 5 of the Swedish Competition Act.

[54] Patent- och marknadsöverdomstolen, www.patentochmarknadsoverdomstolen.se. Patent- och marknadsöverdomstolen replaced the previous Marknadsdomstolen as of 1 September 2016.

[55] Lag (2016:188) om patent- och marknadsdomstolar.

[56] See prop. 2015/16:57, p. 165.

4.3. Some important differences between the traditional Swedish legal dogmatic method applied in areas of Swedish law not influenced by EU law and the legal dogmatic method applied in EU Competition and EU Public Procurement law

In legal areas where Swedish law has not yet been influenced by EU law it is possible to apply the traditional Swedish approach to the legal dogmatic method. Among the characterising features of the Swedish approach is to attach a very high importance not only to precedent judgments (Swedish: prejudikat) given by the Swedish Supreme Court and the Swedish Supreme Administrative Court but also to the preparatory works (Swedish: förarbeten). Moreover, legal literature (Swedish: doktrin) plays a considerable role. Particularly in areas of Swedish law, where Sweden lacks an overall codification of the law, the leading treatises written by prominent professors are very important when applying the traditional Swedish legal dogmatic method.

As set out above, both Swedish competition law and public procurement law are heavily influenced by EU law. Therefore, it is not possible to apply the traditional Swedish legal dogmatic method when writing a dissertation in these two areas of law without adapting far-reaching modifications in particular as to the material used as source of law.[57]

[57] For a comprehensive analysis on how EU law has influenced various fields of Swedish law, see Bernitz, Ulf, *Europarättens genomslag* (Norstedts Juridik, 2012). See also Hettne, Jörgen and Otken-Eriksson, Ida, *EU-rättslig metod – Teori och genomslag i svensk rättstillämpning*, second edition (Stockholm, 2011).

Firstly, the judgments of the supreme Swedish Courts are not the highest source of judicial precedents when EU law is involved. Instead, it is the Court of Justice of the European Union (CJEU) which is the highest court in these areas of law, which implies that the judgments of the CJEU constitute the primary source of legal precedents when writing a dissertation in these areas of law.

Secondly, the preparatory works behind Swedish competition law and public procurement law carries much less weight than in other areas of Swedish law not influenced by EU law.

Thirdly, when making a legal assessment of the EU public procurement directives, it is important not only to take into account the wording of the articles but also of the recitals, which is quite different from the way the traditional Swedish legal dogmatic method is applied.

4.4. Legal dogmatic method applied in this thesis – both EU and Swedish law / both competition and public procurement law

There are a significant number of Swedish dissertations in competition law and there are three Swedish dissertations in public procurement law published so far.[58] To my knowledge, my thesis is the first Swedish dissertation combining an analysis of competition law with an analysis of public

[58] Sundstrand, Andrea, *Offentlig upphandling – primärrättens reglering av offentliga kontrakt*, doctoral thesis presented at the University of Stockholm (Jure Förlag, Stockholm, 2012); Morawetz, Fredrik, *Avbrutna upphandlingar: Ansvar i gränslandet mellan privat och offentlig rätt*, doctoral thesis presented in May 2019 at the

procurement law in the same dissertation, in order to analyse the interaction between competition and public procurement law. Competition and public procurement law have traditionally been considered as separate fields of law but do share several common objectives in promoting competitive markets.

It should be noticed that he legal dogmatic method applied in EU/Swedish competition law differs significantly from the legal dogmatic method applied in EU/Swedish public procurement law. The main provisions of EU competition are part of primary EU law and embodied in Article 101 and Article 102 of the Treaty of the Functioning of the European Union. EU competition law is thus directly applicable and is mainly enforced by way of public enforcement by the national competition authorities and it is the EU Commission itself which is investigating the largest EU- wide infringement of competition law. This means that competition law decisions of the EU Commission play an important role when applying the legal dogmatic method as long as neither the Tribunal nor the CJEU has ruled in a given case. The annual number of Swedish judgments in competition law is very limited.

EU public procurement law is mainly based on a number of EU directives, which then are transformed into national public procurement law. Compared to the area of competition law, there are far more differences between Member States as to the details of public procurement law. Moreover, public enforcement of the law is much more limited in EU public

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University of Lund. Czarnezki, Jason J., *Green Public Procurement – Legal Instruments for Promoting Environmental Interests in the United States and the European Union*, doctoral thesis presented in December 2019 at the University of Uppsala (University of Uppsala, 2019).

procurement law compared to competition law. Instead, private enforcement dominates. In Sweden alone, there are approximately 3 000 judgments published each year in the area of public procurement, which relate to private enforcement of public procurement law before administrative courts.[59] As there traditionally have been very few precedent judgments by the Swedish Supreme Administrative Court in the area of public procurement, there are many legal issues which have not been subject to a precedent judgment at the highest instance, but where there may exist interesting judgments by one of the four administrative courts of appeal or one of the twelve administrative courts. This is the reason why my assessment of Swedish public procurement law includes the analysis of a large number of judgments rendered by administrative courts as the lowest instance, an approach which is very different from the traditional Swedish legal dogmatic method where it would be seen as odd even to consider judgments given at the lowest level of the judiciary.

As set out above, this thesis analyses both EU law and Swedish law in the areas of competition law and public procurement law. This means that this thesis is based on both the traditional Swedish legal dogmatic method and the EU legal dogmatic method. If this had been a thesis on procedural competition law and procedural public procurement law which is mostly based on national law, this thesis would have mainly been based on the

[59] The number of public procurement judicial review proceedings before Swedish administrative courts were 2 850 in 2018, 3 111 in 2019 and 3 594 in 2020 , according to information downloaded from the website of the Swedish Authority on 2 May 2021, see: https://www.konkurrensverket.se/upphandling/statistik/overprovningsarenden-i-domstol/ . During 2019, the percentage of public procurement proceedings which were challenged by a judicial review was 6,6 %, see p. 151 of the report of the Swedish Competition Authority and the Swedish National Agency for Public Procurement, *Statistik om offentlig upphandling 2020*, Report 2020:5 published on www.kkv.se.

Swedish legal dogmatic method. However, this thesis does not cover procedural issues but only issues of substantive law fully governed by EU law (such as the EU principles of public procurement). This means that the thesis is mainly based on the EU legal dogmatic method generally applied in dissertations on EU competition law or EU public procurement law as opposed to the legal dogmatic method applied in dissertations on Swedish law in areas of Swedish law not influenced by EU law. One practical consequence of this is that I have spent much more time analysing the EU public procurement directives – both as to their articles and their recitals – than analysing Swedish preparatory works.

To my knowledge, there are just two earlier European dissertations in public procurement which include elements of competition law in a way that make them very relevant to my research project. These two specific dissertations written by Dorthe Kristensen Balshøj[60] respectively Albert Sánchez Graells[61] are therefore extensively quoted in my thesis when assessing the highly contested question whether there in fact exists a competition principle in EU public procurement law.

The first time I had the opportunity to present my research project to other researchers was at the meeting of the Scandinavian Association of Researchers in Competition Law in Copenhagen back in 2007, where I received valuable input from Nordic researchers on interesting cases in their countries of relevance to my research project. Moreover, I have had the

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[60] Kristensen Balshøj, Dorthe, *Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context*, doctoral dissertation presented on 9 March 2018 at the University of Aarhus.

[61] Sánchez Graells, Albert, *Public procurement and the EU competition rules* (Oxford, Hart Publishing, 2nd edn 2015).

opportunity to continue such discussions at subsequent meetings of the Scandinavian Association of Researchers in Competition Law in Oslo, Bergen, Lund, Stockholm and then Copenhagen again. When writing a dissertation in Swedish law there is a long-standing tradition to include references to how a given legal problem has been solved in the other Nordic countries. This is particularly interesting in areas such as competition law and public procurement law where courts in the other Nordic countries also apply EU law. I have therefore included analyses of some of the most relevant Danish, Finnish and Norwegian court cases in my thesis.

Chapter 5

Presentation of the three main licentiate articles related to the first three research questions analysed at licentiate level only

5.1. First main licentiate article: Mandatory Supply of Interoperability Information: The *Microsoft* Judgment[62]

My first licentiate article is titled *'Mandatory Supply of Interoperability Information: the Microsoft judgment'*.[63] It focuses on a very specific situation where providing information related to interoperability in the software industry is considered to be pro-competitive to such an extent that Microsoft's refusal to supply such interoperability information was regarded as an abuse of a dominant position.

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[62] Related to the first research question at licentiate level: What is the state of law regarding mandatory supply of interoperability information?

[63] Moldén's first main licentiate artide on *'Mandatory Supply of Interoperability Information: The Microsoft Judgment' (2008) 9 European Business Organization Law Review* 305-334, *see Appendix A.*

On 17 September 2007, the Court of First Instance delivered its judgment in *Microsoft Corp.* v. *Commission of the European Communities* ('the *Microsoft* judgment').[64] On 22 October 2007, Microsoft announced that it would not appeal to the European Court of Justice, bringing to an end a lengthy and complex antitrust proceeding initiated by a complaint by Microsoft's competitor Sun Microsystems, Inc. in 1998.

The Court of First Instance upheld the Commission's original *Microsoft* decision of 24 March 2004[65] as to the substance matter and confirmed that the Commission was entitled to impose a fine of approximately EUR 497 million on Microsoft. This fine relates to two separate infringements of EU antitrust law committed by Microsoft: (i) Microsoft's refusal to supply interoperability information that is indispensable for competitors to be able to viably compete in the work group server operating system market; and (ii) Microsoft's tying of Windows Media Player to the Windows operating system. As follows from its title, the first licentiate article focuses exclusively on the first infringement relating to Microsoft's refusal to supply interoperability information.

My article starts out by providing a quick overview of what the *Microsoft* case is all about, followed by a brief presentation of the relevant EU legislation and earlier case law, namely the *Oscar Bronner*, *IBM*, *Tetra Pak II*, *Magill* and *IMS Health* cases. Moreover, some basic features of the partly parallel

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[64] Case T-201/04 *Microsoft* v. *Commission*, judgment of 17 September 2007.

[65] *Microsoft* (Case COMP/C-3/37.792), Commission Decision of 24 March 2004 ('the *Microsoft* decision').

US *Microsoft* case will be presented as to the obligation to supply interoperability information. Then, the reader is provided with an overview of the basic facts of the *Microsoft* case, in particular regarding the relevant technical features of the software industry.

After this preparatory exercise, the main part of the article presents the different legal approaches taken by the Court as opposed to the Commission and my own views as to what I consider are the real novelties of the *Microsoft* judgment. Moreover, I discuss one potential drawback of the *Microsoft* judgment, namely the risk of the court-imposed information exchange spilling over into anti-competitive cooperation in other areas. Finally, I discuss where the *Microsoft* judgment and the *Microsoft* decision stand in relation to the Commission's on-going project aimed at a 'more economic approach' in cases concerning abuse of a dominant position.

5.2. Second main licentiate article: Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective[66]

My second licentiate article is titled *'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective'*.[67] It focuses on procedural aspects of information exchange initiated by

[66] Related to the second research question at licentiate level: What is the state of law regarding exchange of information between competition authorities and courts?

[67] Moldén's second main licentiate article on 'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective', in Basedow, Jürgen; Francq, Stéphanie and Idot, Laurence (eds), *International Antitrust Litigation – Conflict of Laws and Coordination* (Oxford, Hart Publishing, 2012), 289-314 and 433-434, *see Appendix B.*

public authorities, in particular as to the exchange of information and opinions between European competition authorities and courts.[68]

By introducing the new Regulation 1/2003[69] in 2004, the EU moved from a system of a rather centralised application of EU competition law by a single authority – the Commission – to a system of parallel application of EU competition law by national competition authorities and national courts, the scope for conflicts of laws and jurisdictional issues has significantly increased within the ambit of private enforcement of EU competition law.

However, even though national courts and competition authorities are still free, in principle, to apply national procedural law, Regulation 1/2003 imposes strict limitations as to applying national competition law in cases where trade between Member States may be affected. Where national competition authorities and courts apply national competition law to agreements and concerted practices which may affect trade between Member States, they shall also apply Article 101 TFEU. Where the national competition authorities or courts apply national competition law to any abuse prohibited also by Article 102 TFEU, they shall also apply Article 102 TFEU. The application of national competition law may not lead to the prohibition

[68] The background to the choice of this topic was that I in November and December 2007 was a visiting researcher at the Max Planck Institute for Foreign Private and Private International Law in Hamburg. In 2010, professor Basedow, the Institute's president invited me to join a research project funded by the European Commission which he led together with Professor Stéphanie Francq (Louvain) and Laurence Idot (Paris). The subject of the research project was "International Antitrust Litigation: Conflict of Laws and Coordination" and I contributed with a chapter dedicated to procedural aspects of information exchange in the field of competition law enforcement.

[69] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Artides 81 and 82 of the Treaty

of agreements or concerted practices which may affect trade between Member States, but which do not restrict competition within the meaning of Article 101(1) TFEU, or which fulfil the conditions for exemption under Article 101(3) TFEU.[70]

In order to prevent the decentralisation of the application of EU competition law from leading to a significant loss of coherence in uniform application of substantive EU competition law, Regulation 1/2003 introduced a number of new coordination measures, which are the subject of the second licentiate article.

Since May 2004, the Commission is entitled, acting on its own initiative, to submit written *amicus curiae* observations on the application of EU competition law to national courts where the coherent application of EU competition law so requires. National competition authorities are entitled to submit such written amicus curiae observations irrespective of whether the coherent application of EU competition law so requires.[71] National courts on their side are entitled to ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.[72] In order to enable the Commission to monitor national court proceedings where EU competition law is applied, Member States are obliged to forward to the Commission a copy of any written judgment of national courts applying EU competition law.[73]

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[70] See Art 3 Regulation 1/2003.
[71] Art 15(3) Regulation 1/2003.
[72] Art 15(1) Regulation 1/2003.
[73] Art 15(2) Regulation 1/2003.

These new powers do not affect the pre-existing right of national courts to make references for a preliminary ruling on the interpretation of EU competition law to the Court of Justice under Article 267 TFEU.

After presenting the different coordination measures envisaged in Regulation 1/2003 and Article 267 TFEU to foster the coherent application of EU competition law, I then proceed to analyse how well these measures have been working in practice by looking at specific examples of their application. Moreover, part VII.B contains an overview of the legislative history of the coordination measures now embodied in Article 15 Regulation 1/2003. The ultimate objective of my second licentiate article is to come up with specific proposals on how to improve the effectiveness of the system. These proposals – which concern both potential amendments to Regulation 1/2003 as well as potential amendments of national competition law – are summarised in the conclusions to the article.

Ideally, this article would look at how the system is applied in all the 27 Member States. However, for practical reasons, I have decided to focus on the one Member State whose legal system I am most familiar with, i.e. Sweden. This delimitation enables me to make a comprehensive study of all cases where the coordination system embodied in Regulation 1/2003 and Article 267 TFEU has been applied in practice in Sweden.

5.3. Third main licentiate article: Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction[74]

My third licentiate article is titled *'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction'*.[75] The first part of the article focuses on two information exchange related aspects of public procurement, namely information exchange as a monitoring device in bid-rigging cartels and information exchange as a result of tenderers being granted access to sensitive information having been supplied by other tenderers in public procurement proceedings. The second part of the article analyses in its sections 3 to 5 a number of issues related to the interaction between competition law and public procurement law. It presents several proposals for legislative measures for enhanced interaction between these two fields of law. Section 3 (Framework agreements and competition aspects) and section 4 (Public procurement principles and competition) are based on an analysis of competition aspects of public procurement law, while section 5 (Public procurement and competition law) is based on an analysis of public procurement aspects of competition law. In the following,

[74] Related to the third research question analysed at licentiate level only - What is the state of law regarding protection of sensitive information in public procurement proceedings? – as well as the fourth and fifth research questions analysed more in-depth as the first and second research questions at doctoral level.

[75] Moldén's third main licentiate artide on 'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction' (2012) 15 *Europarättslig Tidskrift* 557-615, *see Appendix C*.

each of sections 2 to 5 of the third licentiate article is summarised somewhat more in detail.

Section 2 sets out various aspects of how competition law is applied on actions by tenderers in public procurement proceedings. Firstly, I present Swedish case law concerning bid-rigging. A proposal is presented to amend the Swedish Public Procurement Act in order to highlight the unlawfulness of bid-rigging/joint tenders under Swedish competition law. Then, I analyse 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 to bring its provisions in line with the Directive in this respect.

Section 4 provides an overview of how competition aspects have been dealt with in Swedish case law related to the principle of proportionality, respectively the principle of equality. Then the purpose of public procurement law is discussed, arguing for the need to apply a general competition principle in public procurement law.

Section 5 of my third licentiate article addresses the issue of competition law applicable to actions by contracting authorities. The EU case law in the *FENIN* and *SELEX* judgments is analysed and criticised as it, arguably, limits the application of competition law to public procurement law for no

good reason. A reversal of this case law is therefore proposed. Finally, competition law applicable to long-term agreements and joint purchasing is presented, making analogies to the public procurement rules on too long, respectively too large framework agreements.

Chapter 6

Presentation of the five debate licentiate articles on the new competition principle at licentiate level

In 2012, I presented my third main licentiate article, on the interaction between competition and public procurement law.[76] In 2014 and 2015, I published five brief debate articles on *Upphandling 24* and *Inköpsrådet* and argued, based on the legal assessment in the third licentiate article on the new competition principle in the 2014 EU public procurement directives, that the Swedish legislator should make explicit reference to the new com-

[76] Moldén's third main licentiate artide on 'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction' (2012) 15 *Europarättslig Tidskrift* 557-615, *see Appendix C.*

petition principle in the new Swedish Public Procurement Act, which subsequently came into force as of 1 January 2017. These five debate articles are listed in the following sections.

6.1. First debate licentiate article: This is how the Swedish Public Procurement Act should be modified in order to promote fair competition

My first debate licentiate article is titled "This is how the Swedish Public Procurement Act should be modified in order to promote fair competition".[77]

6.2. Second debate licentiate article: The new classic EU Directive increases competition requirements

My second debate licentiate article is titled 'The new classic EU Directive increases competition requirements'.[78]

[77] Moldén's first debate licentiate artide 'This is how the Swedish Public Procurement Act should be modified in order to promote fair competition' (2014) 1 *Upphandling 24 p* 7 (translated from the original Swedish language version titled 'Så bör LOU ändras för att främja sund konkurrens'), see *Appendix D*.

[78] Moldén's second debate licentiate artide 'The new dassic EU Directive increases competition requirements' (2014) 2 *Upphandling 24 p* 8 (translated from the original Swedish language version titled 'Nytt klassiskt EU-direktiv ökar konkurrenskravet'), see *Appendix E*.

6.3. Third debate licentiate article: Judgment confirms EU Directive's competition principle

My third debate licentiate article is titled: 'Judgment confirms EU Directive's competition principle'.[79]

6.4. Fourth debate licentiate article: That's how the competition principle should be implemented in the new Swedish Public Procurement Act

My fourth licentiate debate article is titled 'That's how the competition principle should be implemented in the new Swedish Public Procurement Act'.[80]

6.5. Fifth debate licentiate article: Better Competition with Direct Effect

My fifth debate licentiate article is titled 'That's how the competition principle should be implemented in the new Swedish Public Procurement Act'.[81]

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[79] Moldén's third debate licentiate artide: 'Judgment confirms EU Directive's competition principle' (2014) 3 *Upphandling 24 p* 11 (translated from the original Swedish language version titled 'Dom bekräftar EU-direktivets konkurrensprincip'), see *Appendix F*.

[80] Moldén's fourth debate licentiate artide: 'That's how the competition principle should be implemented in the new Swedish Public Procurement Act' (2015) 1 *Upphandling 24 p* 13 (translated from the original Swedish language version titled 'Så bör konkurrensprincipen införas i nya LOU'), see *App. G*.

[81] Moldén's fifth debate licentiate artide on 'Better Competition with Direct Effect', published on the Swedish on-line public procurement journal Inköpsrådet on 11 May 2016, (translated from the original

Chapter 7

Presentation of the two doctoral articles

7.1. First doctoral article: 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof'

My first doctoral article is titled 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the *Cartes Bancaires* and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof'.[82] This competition law based article

Swedish language version titled 'Bättre konkurrens med direkt effekt', www.inkopsradet.se), see Appendix H.

[82] Moldén's first doctoral artide on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

analyses in-depth some issues which were first analysed in section 2.1 of my third licentiate article.[83]

7.2. Second doctoral article: The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective

The second doctoral article is titled 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective'.[84] This mainly public procurement law based article analyses in-depth some issues which were first analysed in sections 3 and 4 of my third licentiate article.[85]

[83] Moldén's third main licentiate artide on 'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction' (2012) 15 *Europarättslig Tidskrift* 557-615, *see Appendix C.*

[84] Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J.*

[85] Moldén's third main licentiate artide on 'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction' (2012) 15 *Europarättslig Tidskrift* 557-615, *see Appendix C.*

Chapter 8

Conclusions related to the first three basic research questions analysed at licentiate level only

8.1. Conclusions regarding mandatory supply of interoperability information and the Microsoft judgment

Competition law often aims at preventing the exchange of strategic information between competing firms. The *Microsoft* judgment constitutes a striking example of the opposite, *i.e.* where competition law actually *required* Microsoft, as a holder of a dominant position, to hand over strategic interoperability information to its competitors. The *Microsoft* judgment is an instructive example of information exchange between competitors which would not have occurred in the absence of intervention by public authorities.

The judgment of the Court of First Instance in *Microsoft* represents a major success for the European Commission in its fight against abuses of a dominant position. The Court upheld the Commission's findings that Microsoft abused its dominant position by refusing to supply interoperability information that is indispensable for competitors to be able to viably compete in the work group server operating system market. Moreover, the

Court upheld the record fine of approximately EUR 497 million. According to the Court, the judgment does not contain any legal novelty, as it simply applies earlier *Magill/IMS Health* case law. However, it may be argued that the judgment does contain a legal novelty as to the scope of the so-called new product condition. Arguably, the judgment considerably diminishes the scope for a dominant firm to rely on intellectual property rights as a defence in antitrust proceedings concerning the abuse of a dominant position. In particular, it will probably be more difficult for a dominant firm to invoke the firm's intellectual property rights as a justification for refusing to supply indispensable interoperability information to the firm's competitors.

8.2. Conclusions regarding the exchange of information and opinions between European competition authorities and courts

As set out above, this thesis on information exchange focuses on information exchange related to public procurement or otherwise initiated by public authorities. While the other aspects covered in this thesis analyse substantive competition and public procurement law, the aspect at hand concerns procedural law. When competitors exchange strategic information, anti-competitive effects are likely to occur. However, when information and opinions as to on-going competition law cases are exchanged between competition authorities and courts in the EU, this may entail significant efficiency gains as to the effectiveness of competition law enforcement in the EU. It is therefore interesting to analyse how the present system works and to make proposals for how the system could be improved.

The modernisation of the application of EU competition law in May 2004 entailed a far-reaching decentralisation, empowering national courts and national competition authorities to fully apply EU competition law. The only way for a national court to obtain binding guidance on the interpretation of EU competition law is to make a reference for a preliminary ruling to the Court of Justice. However, this procedure entails an average delay of 15–16 months due to time needed for the Court of Justice to process a reference. During the first 14 years of Sweden's EU membership, from 1995 to 2009, Swedish courts made references for preliminary rulings in 67 cases; only two of these references concern the interpretation of EU competition law.

In order to prevent the decentralisation of the application of EU competition law from leading to a significant loss of coherence in the uniform application of substantive EU competition law, Regulation 1/2003 introduced a number of new coordination measures, which are the subject of my article.

Between May 2004 and April 2009, the Commission received 18 requests for an opinion on the application of EU competition law, including two requests from Swedish courts. In the same period, the Commission submitted written amicus curiae observations on the application of EU competition law to national courts on two occasions. Since then, the Commission has decided to submit amicus curiae observations on at least three more occasions. The Swedish Competition Authority submitted its first ever amicus curiae observations in the *Soda Club* case on 25 March 2010.

I share the view expressed in the Commission's Report on the functioning of Regulation 1/2003 from April 2009 that there are good reasons

for the Commission to have greater recourse to the instrument of amicus curiae observations.

Before the entry into force of Regulation 1/2003, Swedish courts regularly requested opinions on the interpretation of Swedish and EU competition law from the Swedish Competition Authority. While Swedish courts still regularly request opinions from the Swedish Competition Authority on the interpretation of Swedish and EU public procurement law, no Swedish court has requested any opinion on the interpretation of EU competition law since the entry into force of Regulation 1/2003.

One possible explanation for the absence of any requests of opinions from the Swedish Competition Authority may be an *e contrario* interpretation of Article 15(1) Regulation 1/2003, which would lead to the conclusion that Regulation 1/2003 as of May 2004 precludes national courts from requesting opinions on the interpretation of EU competition law from a national competition authority as no such right is foreseen by Article 15(1) Regulation 1/2003. In my view, such an *e contrario* interpretation of Regulation 1/2003 is not appropriate. Instead, Regulation 1/2003 should correctly be understood not to constitute any legal obstacle for Swedish courts' right under Swedish procedural law to request an opinion from the Swedish Competition Authority on the interpretation of Swedish or EU competition law.

It appears that the pros and cons of giving national courts a right under Article 15(1) to request information and opinions also from national competition authorities – as opposed to only from the Commission – were not really debated during the legislative process behind Regulation 1/2003.

In my view, there are good reasons for the Commission to consider proposing amendments to Article 15(1) Regulation 1/2003 in this respect, giving national courts the explicit right to request information and opinions also from national competition authorities. Such an amendment may lead to a more efficient coordination scheme. I consider that this right would be particularly useful in private enforcement cases before courts lacking such expert knowledge of EU competition law which is held by judges active at the specialised courts of public competition law enforcement. The subsequent intrusion into the procedural autonomy of the Member States may well be a price worth paying. Moreover, the degree of additional intrusion into the procedural autonomy of Member States is rather limited as compared to the quite far-reaching intrusion into the procedural autonomy of Member States already caused by the introduction of the right of the national competition authorities and the Commission to submit amicus curiae observations on their own initiative to national courts.

In order to enable the Commission to monitor national court proceedings where EU competition law is applied, its Member States are obliged to forward to the Commission a copy of any written judgment of national courts applying EU competition law. However, it appears that a significant number of such judgments are not reported to the Commission.

One possible explanation for the poor performance of Member States may be a lack of clarity in national competition law on which court or authority shall be responsible for the forwarding of judgments to the Commission. In this respect, it is interesting to look at the provisions of Article 90 a(1) German Act against Restraints of Competition. These provisions state explicitly that it is the duty of the German court giving the judgment

to forward a copy to the Bundeskartellamt, which then forwards it to the Commission.

In my view, the provisions of Article 90a German Act against Restraints of Competition may serve as an example of high clarity and user-friendliness concerning the rights and duties of national courts stemming from Article 15 Regulation 1/2003. In particular, I propose that similar provisions should be inserted into the Swedish Competition Act to increase clarity and make clear which authority is responsible for ensuring that copies of judgments by Swedish courts on EU competition law are forwarded to the Commission. Moreover, I propose that corresponding amendments should be made in competition legislation of other Member States which lack the clarity and user-friendliness of the German Act against Restraints of Competition.

8.3. Conclusions regarding the protection of sensitive information in public procurement proceedings

Swedish administrative courts generally 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 under the Swedish Public Access to Information and Secrecy Act. However, case law is far from settled and further clarifications from the Swedish Supreme Administrative Court would be welcome.

Chapter 9

Conclusions related to the first remaining basic research question at doctoral level:[86] What is the state of law regarding information exchange and bid-rigging cartels?

9.1. Conclusions regarding the Proposal to amend the Swedish Public Procurement Act highlighting the unlawfulness of joint bids[87]

The provisions in the Swedish Public Procurement Act (LOU) which explicitly stipulate that tenderers are entitled to submit joint tenders or to assign each other as sub-contractors are misleading as the uninformed

[86] This has earlier been analysed as the fourth basic research question at licentiate level.

[87] For the legal analysis leading me to this conclusion, see p. 646 of Moldén's first doctoral article on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

reader is made to believe that the provisions take precedence over potential competition law issues in this respect.

Therefore, I propose 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 bidding 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".

9.2. Fines for breach of competition law are of a criminal law character according to the European Convention on Human Rights[88]

Already in 1999, the CJEU ruled in the *Hüls* Case and the *Montecatini* Case of 1999 that fines for breach of competition law are of a criminal law character.

However, it was first in 2011 that the European Court of Human Rights, in the *Menarini* Case, a case concerning an Italian administrative fine for breach of competition law, explicitly ruled that administrative fines for breach of competition law are of a criminal law nature.

[88] For the legal analysis leading me to this conclusion, see p. 647 of Moldén's first doctoral article on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

9.3. The principle of presumption of innocence applies in cases concerning fines for breach of competition law[89]

One of the practical implications of fines for breach of competition law qualifying as having a criminal nature, is that the presumption of innocence applies in such cases according to Article 6 of the European Convention on Human Rights. This means that it is the Competition Authority which, as a rule, has the burden of proof in such cases.

9.4. The requirement of foreseeability of the principle of legality applies in cases concerning fines for breach of competition law[90]

Another practical implication of fines for breach of competition law qualifying as having a criminal nature, is that the principle of legality applies in such cases according to Article 7 of the European Convention on Human Rights. This means that such fines may only be imposed if it was foreseeable for an undertaking by the wording of the competition law provisions, and if

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[89] For the legal analysis leading me to this conclusion, see p. 647 of Moldén's first doctoral article on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

[90] For the legal analysis leading me to this conclusion, see p. 647-650 of Moldén's first doctoral artide on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

applicable, with assistance of relevant case law, that a certain practice would trigger liability under competition law. A particularly interesting situation arises when the Swedish Competition Authority for the first time wants to fine an undertaking for a behaviour which has not formerly been fined, which means that there is no prior case law to assist the undertakings to foresee that a certain practice may entail sanctions of a criminal nature. In such a situation, it is standard procedure for the European Commission to impose a symbolic fine that is so low that it should not be considered having a criminal nature and thus risking to infringe the requirement of foreseeability embodied in the principle of legality under Article 7 in the European Convention on Human Rights. For example, in the *Organic Peroxide* Case,[91] the European Commission imposed a symbolic –and non-criminal law fine of 1 000 Euro on the Swiss consultancy firm AC Treuhand. This was the first time an undertaking not active on the cartelized market (here organic peroxide) was fined for just facilitating the operations of a cartel without itself being active on the market in question. In the absence of prior case law, it was arguably not foreseeable, based on the wording of Article 101 TFEU, that this cartel facilitating practice would entail liability of a criminal law nature. In my view, the Swedish Competition Authority should follow the example of the European Commission in this regard and only request symbolic fines when imposing fines concerning practices not earlier fined in order to ensure that there is no infringement of the principle of legality's requirement of foreseeability embodied in Article 7 of the European Convention on Human Rights.

[91] Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Artide 53 of the EEA Agreement (Case COMP/E-2/37.857 – *Organic Peroxides*), OJ L 110, 30.04.2005, at pages 44–47, upheld by the General Court in Case T-99/04, *Treuhand AG v Commission of the European Communities*, [2008] 5 C.M.L.R. 13.

Once the Swedish Competition Authority has brought such a case and the new practice is found to be anti-competitive by the Swedish Patent and Market Court, there will be prior case law in place next time the Swedish Competition Authority brings such a case, where then high sanctions of criminal law nature will be possible to impose without infringing Article 7 of the European Convention on Human Rights.

9.5. Conclusions concerning the Proposal to amend Regulation 1/2003 to highlight that sanctions for breach of competition law no longer are purely of an administrative law character, but also of a criminal law character according to the European Convention on Human Rights[92]

Even if it follows from Article 23.5 in Regulation 1/2003 that decisions imposing administrative fines for breach of competition law shall not be of a criminal nature, it now follows from the 2011 judgment of the European Court of Human Rights in *Menarini* that such administrative fines in fact are to be regarded as having a criminal nature according to the European Convention on Human Rights. As set out in the European Charter on Fundamental Rights, the European Convention on Human Rights shall be regarded

[92] For the legal analysis leading me to this conclusion, see p. 650 of Moldén's first doctoral article on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

as the minimum protection level, which means that the provisions in the European Convention on Human Rights take precedence over the provisions in Regulation 1/2003.

The wording of Article 23.5 in Regulation 1/2003 has thus become misleading and to some degree obsolete. I therefore propose that Regulation 1/2003 should be amended to reflect the fact that administrative fines concerning breach of competition law may be of a criminal nature under the European Convention on Human Rights.

9.6. Conclusions as to why the case law of the Swedish Supreme Court, the former Swedish Market Court and the new Swedish Patent and Market Court of Appeal is in line with the European Convention on Human Rights in combination with the CJEU landmark judgment in *Cartes Bancaires*[93]

It was on 27 September 2011 that the European Court of Human Rights ruled in the landmark *Menarini* Case that administrative fines for breach of competition law is of a criminal nature. On 18 October 2013, the Swedish

[93] For the legal analysis leading me to this conclusion, see p. 650-651 of Moldén's first doctoral article on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

Supreme Court followed *Menarini*, by finding that an administrative environmental charge of even the modest amount of 5 000 SEK was of a criminal nature in the meaning of the European Convention on Human Rights.

Already a few months before the judgment of the Swedish Supreme Court, the Swedish Market Court had come to the same conclusion in its judgment in the *TeliaSonera* Case of 12 April 2013 as to fines for breach of competition law, an approach later confirmed by the Swedish Market Court on 17 April 2015 in the *Swedavia* Case. Moreover, a set out above, the new Swedish Patent and Market Court in its judgment on 29 November 2017 in the *Alfa Quality Moving* Case followed the *Menarini* approach of the Swedish Supreme Court and the Swedish Market Court, in particular by fully upholding the principle of presumption of innocence.

9.7. Conclusions as to why the case law of the Stockholm District Court and the Swedish Patent and Market Court is *not* fully in line with the European Convention of Human Rights in combination with the CJEU landmark judgment in *Cartes Bancaires* as well as the CJEU judgment in *Hüls*[94]

It was in its 2014 *Tyres* Case judgment that the Stockholm District Court first presented its line of reasoning why the burden of proof of showing that

[94] For the legal analysis leading me to this conclusion, see p. 651-655 of Moldén's first doctoral article on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention

the undertakings could not have submitted independent tenders on their own should be on the undertakings and not on the Swedish Competition Authority.

In my first doctoral article, I conclude that the approach taken by the Stockholm District Court and the Swedish Patent and Market Court is *not* fully in line with the presumption of innocence embodied in the European Convention of Human Rights in combination with the CJEU landmark judgment in *Cartes Bancaires* as well as the CJEU judgment in *Hüls*.

9.8. The Swedish Competition Authority should focus on an in-depth investigation of whether the undertakings lack the capacity to submit independent tenders on their own when investigating cases of joint bidding[95]

According to the current case law of the Stockholm District Court set out above, it is not the Swedish Competition Authority but the undertakings who have the burden of proof to show that they lacked the capacity to submit independent tenders on their own. If the new Swedish Patent and Market Court at the Stockholm District Court were to uphold the earlier case law of

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on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

[95] For the legal analysis leading me to this conclusion, see p. 655 of Moldén's first doctoral article on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

the Stockholm District Court to place the burden of proof on the undertakings in future cases of allegedly joint bidding it appears, *prima facie*, that there would be no need for the Swedish Competition Authority to devote considerable resources to investigate the complex issue whether the undertakings lack the capacity to submit independent tenders on their own when investigation cases of joint bidding.

However, in my view, the well-established case law of the Stockholm District Court to put the burden of proof on the undertakings to prove that they lack the capacity to submit independent tenders of their own is not fully in line with the presumption of innocence according to Article 6 of the European Convention and the restrictive approach as to the scope of infringement by object required by the CJEU in its *Cartes Bancaires* judgment. Nor would such an approach be in line with the approach to give full effect to the presumption of innocence by the Swedish Supreme Court in the *Kezban* Case, by the Swedish Market Court in the *TeliaSonera* expressed by the *Swedavia* Case as well as by the new Swedish Patent and Market Court of Appeal in the *Alfa Quality Moving C*ase. This means that, any future judgment of the Swedish Patent and Market Court at the Stockholm District Court placing the burden of proof on the undertakings, is likely to be overturned by the Swedish Patent and Market Court of Appeal. Therefore, it would indeed make sense for the Swedish Competition Authority when investigating future cases of joint bidding from the outset to focus heavily on the issue whether the undertakings lack the capacity to submit independent tenders.

9.9. The Swedish Competition Authority should start bringing cases concerning fines for breach of competition law even if a practice lacks anti-competitive object, if it has anti-competitive effects[96]

To my knowledge, the Swedish Competition Authority has not sued for fines in a single case where the investigation leads to the conclusion that a practice "only" has anti-competitive effects but no anti-competitive object.

This restrictive approach as to imposing fines on practices with just anti-competitive results might have been more justified in a situation where the notion of infringement by object was supposed to have a broad scope.

However, as is clear from the CJEU judgment in *Cartes Bancaires* and the judgment of the Swedish Patent and Market Court of Appeal in *Alfa Quality Moving*, the scope for classifying an anti-competitive practice as an infringement by object is very limited. This makes it more important for the Swedish Competition Authority to also bring on cases of anti-competitive effects without anti-competitive object, as there otherwise would be a serious risk for an enforcement gap concerning a large number of practices which are indeed bad for competition but cannot (longer) be classified as infringements by objects.

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[96] For the legal analysis leading me to this conclusion, see p. 656 of Moldén's first doctoral article on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I*.

This applies in particular to joint bidding. Even if joint bidding no longer can be classified as an infringement by object, when a complex and in-depth analysis first is needed as to whether the undertakings had the capacity to submit independent tenders of their own, joint bidding can still have very serious anti-competitive effects when entered into by undertakings which in fact could have submitted independent tenders of their own. My policy recommendation in this regard is based on the view expressed by Advocate General Nils Wahl who in his opinion in *Cartes Bancaires* stated:

> "62. Lastly, I would observe that such an interpretation does not effectively 'immunise' certain conduct by exempting it from the prohibition under Article 81(1) EC. Where it has not been established that a certain agreement is not specifically — that is to say in the light of its objectives and its legal and economic context — capable of preventing, restricting or distorting competition on the market, only recourse to the concept of restriction by object is ruled out.
>
> The competition authority will still be able to censure it after a more thorough examination of its actual and potential anti-competitive effects on the market."

9.10. New principle of contracting authority reduced competition excluding infringement by object[97]

In the landmark judgment in the Aleris Clinical Physiology Services Case of 2017, the Swedish Patent and Market Court of Appeal established a new principle when assessing whether a cooperation between tenders related to a

[97]For the legal analysis leading me to this condusion, see p. 657 of Moldén's first doctoral artide on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I.*

public procurement proceeding is to be regarded as having an anti-competitive object, when considering the economical and legal context. If competition in a public procurement proceeding is hampered by the way the contracting authority has designed it, cooperation between suppliers that would normally constitute an infringement by object cannot be regarded as infringement by object – because the reduction of competition induced by the contracting authority has to be taken into consideration when putting the cooperation in its economic and legal context. It is proposed that the new principle established by this judgment can be called the principle of contracting authority reduced competition excluding infringement by object. This new principle has been confirmed by the Swedish Patent and Market Court in its judgment in the Telia/GothNet Data Communication Services Case of 2018.

9.11. Conclusions regarding the application of EU competition law to contracting authorities when procuring[98]

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

[98] For the legal analysis leading me to this conclusion, see p. 13-14 of Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

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. The FENIN-SELEX case law is not well-founded and should be reversed/adapted so that purchases by ways of public procurement fall under the scope of competition law irrespectively of the subsequent 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.

9.12. Conclusions as to the role of private enforcement against breaches of EU competition law committed by contracting authorities when procuring[99]

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.

[99] For the legal analysis leading me to this conclusion, see p. 22-23 of Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

Chapter 10

Conclusions related to the second remaining basic research question analysed at doctoral level:[100] What is the state of law regarding the role of competition in public procurement law and in particular the new competition principle?

10.1. Conclusions as to the new general competition principle within public procurement law[101]

As the obligation for contracting authorities not to artificially restrict competition has now been consolidated into Article 18 (1) of the New Classical Sector Directive of 2014 under the title "Principles of procurement" the

[100] This has earlier been analysed as the fifth basic research question at licentiate level.

[101] For the legal analysis leading me to this conclusion, see p. 77-80 of Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

question whether the competition principle can be directly deduced from general principles of EU law has lost its practical relevance, as it now follows clearly form the wording of Article 18 (1). Moreover, in view of the pro-competitive provision being placed under the title "Principles of procurement", it would constitute an unwarranted *contra legem* interpretation to deny the new pro-competitive provision its status as a general principal of public procurement law.

However, the new general competition principle stipulated by Article 18 (1) is currently very difficult to apply in practice. The reason for this is the condition of anti-competitive intention, which if it is to be interpreted in a subjective way, would be very difficult to prove for any supplier requesting a judicial review of a public procurement proceeding. The notion of anti-competitive intention therefore needs to be clarified, preferably by way of a preliminary ruling from the CJEU, before it could be regularly applied.

However, as to framework agreements it clearly does make sense that no anti-competitive intention is required and that, under Recital 61 of the New Classical Sector Directive it is sufficient for the supplier to prove anti-competitive effects. Therefore, for the vast majority of cases where the competition principle actually may be applicable – i.e. in cases of large framework agreement – it is not the new general competition principle but the framework agreement related competition principle established by the Former Classical Sector Directive of 2004 and reaffirmed by Recital 61 of the New Classical Sector Directive of 2014 which would normally be invoked by those suppliers which are aware of the provisions, which can be said to be rather unfortunately hidden in Recital 61.

10.2. Conclusions as to why the Swedish legislator should insert the following explicit provision into the Swedish Public procurement Act: "Framework agreements may not be used in such a way as to prevent, restrict or distort competition."[102]

In my view, it is very unfortunate that the framework related competition principle, which is very relevant from a practical perspective is not mentioned at all in the New LOU of 2017 as opposed to the new general competition principle, which from a practical perspective is much less relevant. It is therefore proposed that the Swedish legislator should insert a new Article into Chapter 7 on framework agreements in the New LOU of 2017. A new provision, implementing Recital 61 of the New Classical Sector Directive should be inserted as the new Article 2 of the chapter having the following wording: "Framework agreements may not be used in such a way as to prevent, restrict or distort competition." By including this provision it would follow directly from the wording of the New LOU that as to framework agreements, there is no such condition of proving anti-competitive intention at the contracting authority for applying the competition principle.

[102] For the legal analysis leading me to this conclusion, see p. 80 of Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*. See also section 14.4 below.

10.3. Conclusions as to why the Swedish Competition Authority as well as the Swedish National Agency for Public Procurement should follow the example of the EU Commission and the Swedish Government to publish information on the competition principle on their homepages[103]

As concluded above, Chapter 4, Article 2 of the New LOU of 2017 together with Article 18 (1) of the New Classical Sector Directive of 2014 established a new general competition principle in public procurement law. Therefore, I propose that the Swedish Competition Authority as well as the Swedish National Agency for Public Procurement should consider including information on the new general competition principle on their websites when informing on the principles of public procurement law.

[103] For the legal analysis leading me to this conclusion, see p. 82-83 of Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

10.4. Conclusions as to the importance of enabling the Swedish Competition Authority to take legal action against anti-competitive design of public procurement proceedings – as it used to have until 2008[104]

As stated by the Swedish Supreme Administrative Court in its judgment of 10 December 2018 in Case HFD 2018 ref. 71, the Swedish Competition Authority currently has no formal competence to prohibit any anti-competitive behaviour by a contracting authority under public procurement law. It is therefore proposed that the Swedish legislator should consider to re-enact a formal competence to the Swedish Competition Authority to intervene against infringements of the new general competition principle and the framework related competition principle, in a way similar to the formal competence the Swedish Competition had until 2008 under the Act on Intervention against Improper Behaviour Related to Public Procurement of 1994.

[104] For the legal analysis leading me to this conclusion, see p. 83-87 of Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*. See also section 14.5 below.

10.5. Conclusions as to why Swedish administrative courts should move from a pro-formalistic approach to a more pro-competitive and effects-based approach when assessing whether a certain public procurement proceeding is in line with the framework related competition principle as well as the new general competition principle of public procurement law[105]

When assessing whether a given public procurement proceeding infringes the framework related competition principle or the new general competition principle under Recital 61, respectively Article 18 (1) of the New Classical Sector Directive of 2014 it is necessary also to take the actual effects of a public procurement proceeding into consideration. The judgments of the Swedish Supreme Administrative Court in *the Swedish Migration Agency Case of 2002* and *the Frölunda El Case of 2013*, according to which administrative courts should exclusively focus on the issue of whether the contracting authority has acted correctly from a formal perspective, in my view infringes the EU principle of effectiveness and should therefore be disregarded, respectively revoked.

[105] For the legal analysis leading me to this conclusion, see p. 87-91 of Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*. See also section 13.2 below.

Chapter 11

Conclusions related to the overriding research question at doctoral level: the new competition principle of public procurement is a more suitable legal instrument for making public procurement more pro-competitive than competition law

Requiring contracting authorities to act pro-competitively when procuring can be achieved in two different ways. By way of applying competition law to the actions of contracting authorities or by incorporating competition aspects in public procurement law, either as part of the established principles of equal treatment and proportionality, or by applying a general or framework agreement specific competition principle in public procurement law.

When it comes to actions of bidders in public procurement – such as bid-rigging or anti-competitive information exchange - I conclude that competition law as it stands today and as enforced by the Swedish Competition Authority is relatively well placed to make bidders refrain from anti-competitive cooperation related to public procurement.[106]

However, as to the actions of contracting authorities, I conclude that competition law as it stands today is *not* well suited to require contracting authorities to act pro-competitively.[107]

Firstly, according to the FENIN/SELEX settled case law of the CJEU, actions by contracting authorities are entirely outside the scope of competition law when the goods and services procured are used for non-economic activities related to the exercise of public power.

Secondly, if a contracting authority designs a public procurement proceeding in a way which may seriously harm competition, the prohibition against anti-competitive cooperation embodied in Article 101 of the TFEU would not apply as long as this decision is taken unilaterally, without engaging in any cooperation with others in this respect. Such unilateral action can only be subject to EU competition law if it amounts to an abuse of a dominant position under Article 102 of the TFEU. I am not aware of any Swedish or EU judgment there a contracting authority has been found to abuse its dom-

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[106] See section 2 of Moldén's first doctoral artide on 'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof', (2018) *21 Europarättslig Tidskrift 593-657*, see *Appendix I*.

[107] See section 10.11 above and section 2 of Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

inant position when procuring. The reason for this may simply be that contracting authorities, even when enjoying significant market power on the buying markets very seldom will have a dominant position as the demand for goods and services for any given product or service generally is higher from the private sector than the public sector.

A potential field of application of EU competition law would be on contracts having a duration of more than five years, which under certain circumstances could be found anti-competitive under EU competition law. However, in practice, the long duration of contracts is mostly a problem related to framework agreements, where EU public procurement law prescribes an even shorter period of four years to be acceptable.

As set out in my second doctoral article[108], competition aspects have already for a long time played a significant role as elements taken into consideration when applying the public procurement principles of equal treatment and proportionality. Moreover, I conclude that the 2014 new EU public procurement directives have in fact established, in principle, a new general competition principle within EU public procurement law.[109]

However, I also conclude that the new condition attached to applying this new general competition principle – anti-competitive intention at the contracting authority – will severely restrict the application of this new general competition principle in practice, because it will generally be very diffi-

[108] See sections 4 and 5 of Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

[109] See section 11.1 above and section 7 of Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

cult or even impossible for any bidder to prove such anti-competitive intention in a judicial procedure. Based on my legal assessment of Article 18 (1) of the New Classical Public Procurement Directive of 2014 together with Recital 61 of the Directive, which clearly states that "framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition", I conclude that there is no requirement under EU law for a bidder to prove any anti-competitive intention of the contracting authority when requesting a court to find that a given award decision should be declared illegal due to the design of a framework agreement breaching the principle of competition.

In view of my specific conclusions set out above, my overall conclusion as to the overriding research question at doctoral level is as follows: The new competition principle of public procurement is a more suitable legal instrument for making public procurement more pro-competitive as compared to using ordinary competition law.

Reasons for reaching the opposite conclusions compared to Dorthe Kristensen Balshøj's dissertation on the application of competition law to contracting authorities in a procurement context

As already set out in section 3.3 above, Dorthe Kristensen Balshøj in her doctoral thesis presented at the University of Aarhus reached the opposite conclusion, as follows from the following quote:

"As to the so-called principle of competition, since competition plays a major part in procurement, procurement rules and competition rules ought to develop consistently. When developed consistently – and if the contracting authority is deemed an undertaking – then the tools used in competition law can also be used regarding procurement, and the public buyers can be disciplined properly.

This appears to be a correct interpretation although calling it a principle may be a stretch – among others because when mentioning the principles in the recitals of Directive 2014/24/EU (e.g. Recital 1), there is no mention of competition. What is more, it can be argued that the principles of equal treatment and competition are so closely connected that they make up two sides of the same coin, for which reason there is no need – or room for – a principle of competition.

Finally, elevating the embedded competition to a principle does not seem to have any consequences at all. As the competition is embedded it must always be considered, but calling it a principle makes no difference.

So to conclude, competition plays a major role in procurement, but in this author's opinion there is no such thing as a competition principle. But even so, it would not change the fact that an assessment of whether the contracting authority carries out economic activity must be made. A principle cannot be used to couple two sets of rules."[110] (emphasis added)

The main reason for us reaching opposite conclusions appears to be our opposite views on the existence of a competition principle in public procurement law. In Kristensen Balshøj's view, there is no competition principle and therefore it cannot be applied. Moreover, Kristensen Balshøj seems to take a somewhat less skeptical view than me as to the practical potential for competition law to function as a legal instrument to properly discipline contracting authorities to act pro-competitively when procuring. For the reasons set out in the beginning of this section, I therefore conclude that competition law as it stands today is not a suitable legal instrument to properly discipline contracting authorities to act pro-competitively when procuring.

Need for future research on the implications of the new competition principle within public procurement law

The aim of the present thesis is to be the first Swedish comprehensive academic analysis at doctoral level of the new competition principle in public

[110] Dorthe Kristensen Balshøj, Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context, doctoral dissertation presented in 2017 at Aarhus University, p. 67.

procurement law. I have thus focused on a legal assessment as to the *existence* of such of a competition principle in EU and Swedish public procurement law. As to the *application* and *practical impact* of the new competition principle on public procurement in different situations, I have limited myself to analysing framework agreements for being anti-competitive in view of their long duration or large scope. Once established as a new principle of public procurement law, there will be considerable scope for future researchers to analyse other practical implications of the new competition principle in EU public procurement law.[111]

Practical examples of the potential implications of the new competition principle within public procurement law

One way to highlight some of the potential implications of the new competition principle is to look at earlier judgments related to the interaction between competition and public procurement and then to discuss how the same court, based on the same facts of the case, but giving full effect to the

[111] Researchers currently looking at the interaction between competition and public procurement include the doctoral candidate at Stockholm University Pernilla Norman as well as my fellow doctoral candidates at the Stockholm School of Economics, Dagne Sabockis and Johan Hedelin. It is also interesting to note that the Swedish Competition Authority recently has published a report on Competition and Public Procurement written by professor Fredrik Andersson (Report 2020:2 on "Konkurrens och offentlig upphandling", available on the website of the Swedish Competition Authority www.kkv.se . Moreover, the Swedish Competition Authority has recently published a new information brochure on how to make use of competition in public procurement ("Nyttja konkurrensen vid offentliga upphandlingar"), which has been published on https://www.konkurrensverket.se/globalassets/publikationer/informationsmaterial/nyttja-konkurrensen-vid-offentliga-upphandlingar.pdf. On 18 March 2021, the European Commission published its Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, C(2021) 1631 final, which can be dowloaded from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0318(01)&from=EN.

new competition principle, could have assessed the case differently. In chapter 12 below, I have identified thirteen particularly interesting judgments, related to the interaction between competition and public procurement.

Chapter 12 below has a very different character compared to the other chapters. In the first twelve chapters of this comprehensive summary, I have summarized my articles at licentiate and doctoral level, focusing on the conclusions I have reached on my research questions. The purpose of chapter 12 goes beyond a mere summary of what I have already written in the articles. As set out above, this thesis focuses on the contested issue of whether there exists a new competition principle in public procurement law, in principle, leaving the practical implications of a new competition principle for future research. However, in order to assess the practical relevance of this thesis, it may be useful to briefly present some practical cases highlighting the relevance and potential impact of the new general competition principle by using the thirteen earlier judgments set out in the subsequent chapter 12 as practical examples.

What does it take to make the competition principle work not only in theory, but also in practice?

While my thesis focuses on the fundamental question whether there is a new competition principle in EU and Swedish public procurement law, my articles written at both licentiate and doctoral level include a number of concrete proposals directed towards the Swedish legislator as well as towards the Swedish Supreme Administrative Court as to what it takes to make the competition principle work not only in theory, but also in practice. My five most important proposals *de lege ferenda* are summarized in chapter 13, which constitutes the final chapter of this comprehensive summary.

Chapter 12

Potential impact of the new competition principle on future case-law – thirteen practical examples

In this last but one chapter, I will briefly present thirteen earlier judgments related to the interaction between competition and public procurement in chronological order, from the landmark judgment of the CJEU in the *Bridge over the Storebaelt Case of 1993* to the CJEU judgment in the *Roche Lietuva Case of 2018*. For each judgment given by the CJEU or the Swedish court in question, I will then briefly discuss how the court, if presented today with the same facts of the case, arguably could have decided the case if giving full effect to the new competition principle. The purpose of this chapter is not to conduct an in-depth legal analysis but to briefly set out, by way of practical examples, the relevance and potential implications of the new competition principle – and thus of this thesis – if given full effect by the CJEU and Swedish courts in future judgments.

12.1. The Bridge over the Storebaelt Case of 1993 – CJEU[112]

If asked what principle came first in the history of EU public procurement law – equal treatment or competition –, I think that many people in the public procurement community would answer that equal treatment came first. Indeed, the principle of equal treatment is today generally acknowledged to constitute one of the most important principles of EU public procurement law, while the existence of a competition principle is contested.

It is therefore interesting that also the existence of the principle of equal treatment in EU public procurement has been contested and even more interesting that the principle of equal treatment actually has been derived from effective competition as a purpose of EU public procurement law. This was established by the CJEU in its landmark judgment in the Bridge over the *Storebaelt Case of 1993*.

This case concerned the award of the contract to construct the Storebaelt bridge in Denmark. The award decision was challenged on several legal grounds, one being that the contracting authority had decided to negotiate with and then to award the contract to a bidder which did not fulfill all the mandatory requirements contained in the procurement documents. One of the losing bidders initiated legal proceedings and claimed that the contraction authority, by deviating from a mandatory requirement, had breached the principle of equal treatment. The Kingdom of Denmark argued, in a way that would be regarded as obviously unfounded today, that there could not be a

[112] Judgment of the CJEU in Case C-243/89, *Commission* v *Kingdom of Denmark*, of 22 June 1993. This judgment has been presented on p. 59 in the second doctoral artide.

breach of the principle of equal treatment because there was no principle of equal treatment in EU public procurement law at that time.

The CJEU, however, did for the first time acknowledge the existence of a principle of equal treatment in EU public procurement law, reasoning as follows:

"Since the Commission claims in its pleadings, which were re-worded in its reply, that Storebaelt acted in breach of the principle that all tenderers should be treated alike, the Danish Government's argument that that principle is not mentioned in the directive and therefore constitutes a new legal basis for the complaint of breach of State obligations must be considered first. On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, **to ensure in particular the development of effective competition in the field of public contracts** and which, in Title IV, lays down criteria for selection and for award of the contracts, **by means of which such competition is to be ensured**."[113] (emphasis added)

Today, almost 30 years after the CJEU gave judgment in the Bridge over the *Storebaelt Case*, the principle of equal treatment is a very well-established principle of public procurement. At the same time it is now contested whether the following provision of Article 18 (1) of the New Classical Sector Directive of 2014 constitutes a competition principle:

"The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."

[113] Judgment of the CJEU in Case C-243/89, *Commission* v *Kingdom of Denmark*, of 22 June 1993, para. 33-34.

In my view, the judgment of the CJEU in the *Storebaelt Case* is very important for understanding the interaction between equal treatment and effective competition in public procurement law. It is important to recall that the principle of equal treatment was derived from the purpose of public procurement law to ensure effective competition and not *vice versa*. Therefore, from a historic perspective, effective competition came first and then equal treatment. Hence, initially, equal treatment was not considered to be a goal in itself, but a way to make public procurement more pro-competitive. If the facts of the *Storebaelt Case* were to come before the CJEU today and the principle of equal treatment had not yet been acknowledged, I think that the CJEU probably would refer to the new competition principle established by 18 (1) of the New Classical Sector Directive of 2014 as a legal ground for requiring equal treatment of bidders.

Moreover, it is important to note that the CJEU derived the principle of equal treatment not from a provision concerning effective competition in the *articles* of a public procurement directive, but from one of the *recitals* of the directive. As set out in section 4.3 above one of the most important differences between the legal dogmatic method applied in EU public procurement law compared to the traditional Swedish legal dogmatic method is the relatively high relevance attributed by the CJEU to the wording of the recitals when interpreting the EU directives concerning public procurement and the relatively low relevance attributed to the preparatory works. This is exactly the opposite approach compared to the traditional Swedish legal dogmatic method, where a very high relevance is attributed to the wording of the preparatory works as compared to the wording of recitals, which traditionally do not play any significant role in Swedish law. In practice, much of the role

attributed to the wording of the preparatory works in helping to interpret the meaning of a certain provision under Swedish law is instead attributed to the wording of the recitals when applying EU public procurement law.

12.2. The Children Dental Care Case of 1999 – Supreme Administrative Court[114]

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 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." (my

[114] Judgment of the Supreme Administrative Court in Case 1999, RÅ not 1, *Kronobergs läns landsting* v *Anders Englund Tandläkarpraktik AB*, of 12 January 1999. This judgment has been analysed on p. 44-45 in the second doctoral artide.

translation and emphasis) On these grounds, the Swedish Supreme Administrative Court decided that the public procurement proceeding had to be redone.[115]

This judgment was based on the provisions of Chapter 1, Article 4, first paragraph, of the former Swedish Public Procurement Act of 1993, which 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."[116]

The Swedish Public Procurement Act of 1993 thus contained an explicit obligation on contracting authorities to make use of the existing possibilities for competition, which arguably constitutes some kind of early competition principle. However, as set out below, the scope of the earlier competition principle contained in the Swedish Public Procurement Act of 1993 had a more limited scope compared to the new competition principle. 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 in this regard:

"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.*"[117] (my translation and emphasis)

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[115] 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.

[116] The Swedish wording of the provisions in Chapter 1, Artide 4, first paragraph, of the former Swedish Public Procurement Act of 1993, Lag (1992:1528) om offentlig upphandling, was as follows: "Huvudregel om affärsmässighet. Upphandling skall göras med utnyttjande av de konkurrensmöjligheter som finns och även i övrigt genomföras affärsmässigt."

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

When the former LOU of 1993 was replaced by the former LOU of 2008, the explicit obligation to make use of the existing possibilities of competition when following the principle of acting in a businesslike way disappeared from the Swedish public procurement act, making place for the five established EU general principles of public procurement.

If the Swedish Supreme Court were to apply the new general competition principle of public procurement law, as established by Article 18 (1) of the New Classical Sector Directive of 2014 and implemented by Chapter 4, Article 2 of the New LOU of 2017, I think that the Swedish Supreme Administrative Court would make the following point: As opposed to the earlier competition principle of 1993, which only imposed a passive duty on contracting authorities to utilize the existing competition, the new competition principle has a much wider scope, as it also obliges contracting authorities to take an active responsibility ensuring that the design of a procurement does not hurt competition.

Hence, the practical implication of the new competition principle is that contracting authorities cannot take competition for granted and just utilize competition at hand. In fact, contracting authorities are not only passive market spectators but active market participants whose actions may significantly affect market conditions and competition. Contrary to the old competition principle embodied in the former Swedish Public Procurement Act of 1993, the new competition principle imposes an active obligation to ensure that the way they conduct public procurement proceedings is pro-competitive and not anti-competitive.

12.3. The Swedish Migration Agency Case of 2002 – Swedish Supreme Administrative Court[118]

In 2001, The Swedish Migration Agency conducted a public procurement proceeding concerning IT-services. The company Sonera Juxto AB successfully challenged the award decision before the Administrative Court of Östergötland, whose judgment was upheld by the Jönköping Administrative Court of Appeal. The Swedish Migration Agency appealed the judgment to the Swedish Supreme Administrative Court. In its landmark judgment of 13 June 2002, the Swedish Supreme Administrative Court agreed with the lower courts that the procurement documents as well as the evaluation method had certain shortcomings and were not designed in an optimal way. However, contrary to the lower courts, the Swedish Supreme Administrative Court found that these shortcomings were not sufficient as to constitute an infringement of public procurement law. The Swedish Supreme Administrative Court's reasoning follows from the following quote:

"In view of the different circumstances occurring in business life, also public procurement documents and evaluation models which are not optimally designed have to be accepted on the condition that the principles underlying Swedish public procurement legislation and EU-law are not infringed".[119]

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[118] Judgment of the Swedish Supreme Administrative Court in Case RÅ 2002 ref. 50, *The Swedish Migration Agency*, of 13 June 2002 (Judges Ragnemalm, Hulgaard, Schäder, Almgren, Melin). This judgment has been analysed on p. 87-88 in Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

[119] The original Swedish version reads as follows: "De skiftande förhållanden som förekommer i det ekonomiska livet gör att även förfrågningsunderlag och utvärderingsmodeller som inte är optimalt utformade får godtas under förutsättning att de principer som bär upp lagen om offentlig upphandling och gemenskapsrätten inte träds för när."

The judgment of the Swedish Supreme Administrative Court in the *Swedish Migration Agency Case of 2002* is probably one of the most influential precedents ever on Swedish public procurement law and has since 2002 been successfully relied upon by many contracting authorities in defense of poorly designed evaluation models. Unfortunately, the effect of the precedent has been that poorly designed evaluation models may have been considered in line with public procurement law irrespectively of their adverse effect on competition as long as they have been in line with formal requirements of law.

In my view, the judgment of the Swedish Supreme Administrative Court in the *Swedish Migration Agency Case of 2002* is not in line with the new competition principle of public procurement law. Procurement documents and evaluation models which are not optimally designed should not be accepted if they have the effect of artificially narrowing competition and thus infringing the effects based competition principle, regardless of whether they violate any other competition principles from a more formalistic perspective. The Swedish Supreme Administrative Court may therefore arguably come to a different conclusion if it were to apply the new competition principle of public procurement law, as established by Article 18 (1) of the New Classical Sector Directive of 2014 and implemented by Chapter 4, Article 2 of the New LOU of 2017, on the same facts.

12.4. The Nursing Home Case of 2009 – Göteborg Administrative Court of Appeal[120]

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 Procurement 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 [the Former] LOU [of 2008] 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.*"[121] (my translation and emphasis)

This judgment is interesting as it stated that effective competition in both the short as the long run is one of the purposes of competition law. Nevertheless, the Göteborg Administrative Court of Appeal found that *long-term*

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[120] Judgment of the Göteborg Administrative Court of Appeal in Case 6411-08, *Björkviks Vårdhem AB* v *Kommunförbundet Skåne*, of 7 April 2009. I 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. This case has been analysed on p. 45-46 in the second doctoral artide.

[121] 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.

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.

In my view, the judgment of the Göteborg Administrative Court of Appeal in the *Nursing Home Case of 2009* is not compatible with the new general competition principle of public procurement law, as established by Article 18 (1) of the New Classical Sector Directive of 2014 and implemented by Chapter 4, Article 2 of the New LOU of 2017. If a Swedish court today were to give judgment based on the same facts, while giving full effect to the new competition principle, it would arguably find the following: The fact that the large 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 a typical fact which in itself can constitute an infringement of the new competition principle.

12.5. The Table-top Case of 2009 – Göteborg Administrative Court of Appeal[122]

The Cities of Helsingborg and Landskrona conducted a public procurement proceeding concerning furniture. As to the size of tables, there was a

[122] 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. I worked at that time as associate judge at the Göteborg Administrative Court of Appeal and served as one of three judges giving judgment in this case. This judgment has been presented on p. 36 in Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

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.

If the Göteborg Administrative Court of Appeal had applied a purely formalistic approach to the principle of equal treatment it would not have mattered whether it is considerably more expensive to produce a table with a length of 2.40 compared to a table with the length of 2.00 m. However, in finding that there was an infringement of the principle of equal treatment, the Court underlined that it is 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. This means that a bidder offering a table with the length of 2.00 m would have a cost-based competitive advantage compared to the bidder offering a table with the length of 2.40 m.

In my view, such a competition based application of the principle of equal treatment is very much in line with the new general competition principle of public procurement law, as established by Article 18 (1) of the New Classical Sector Directive of 2014 and implemented by Chapter 4, Article 2 of the New LOU of 2017.

12.6. The Invisible Light Case of 2011 – Sundsvall Administrative Court of Appeal[123]

The Swedish Transport Administration (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 to 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.[124] On appeal to the Sundsvall Administrative Court of Appeal, the Swedish Transport Administration referred to a legal opinion issued by jur.dr. Andrea Sundstrand, according to which the Swedish Transport Administration was not obliged to accept alternative technical solutions, e.g. solutions including visible light.

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[123] Judgment of the Sundsvall Administrative Court of Appeal in Case 1985-11, *Trafikverket* v *Kapsch TrafficCom Aktiebolag*, of 26 October 2011. This judgment has been presented on p. 33 in Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

[124] Judgment of the Falun Administrative Court in Case 1741-11, *Kapsch TrafficCom* v *Trafikverket*, of 5 July 2011. This judgment has been analysed on p. 33 in the second doctoral artide.

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.[125] 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.

In my view, the Sundsvall Administrative Court of Appeal may arguably come to a different conclusion if it were to apply the new general competition principle of public procurement law, as established by Article 18 (1) of the New Classical Sector Directive of 2014 and implemented by Chapter 4, Article 2 of the New LOU of 2017, on the same facts. Alternatively, the court could attribute more weight to the anti-competitive effects when applying the principle of proportionality.

[125] 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.

12.7. The Frölunda El Case of 2013 – Swedish Supreme Administrative Court[126]

On 15 February 2013, the Swedish Supreme Administrative Court gave judgment in a landmark case on procedural issues in public procurement review procedures, finding that it is permissible to introduce new grounds on appeal before an administrative court of appeal which have not been raised before the administrative court of first instance. What is very interesting for the purpose of this thesis is the general statement on the scope of a review procedure made by the Swedish Supreme Administrative Court:

> "The judicial review procedure does not take the actual effects of a public procurement proceeding into consideration, it exclusively focuses on the issue of whether the contracting authority has acted correctly from a formal perspective and has adhered to the principles of public procurement and procedural rules indicated in the Swedish public procurement legislation."[127]

In my view, the judgment of the *Swedish Supreme Administrative Court in the Frölunda El Case of 2013* constitutes a very clear example of the over-formalistic approach to public procurement law taken by the Swedish Supreme Administrative Court. If the judicial review procedure may not relate to the actual effects of a public procurement proceeding, it is in my view very difficult and may be even impossible to apply the competition principle. Obviously, the assessment whether a public procurement proceeding artificially narrows

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[126] Judgment of the Swedish Supreme Administrative Court in Case HFD 2013 ref. 5, *Frölunda El & Tele AB* v *Göteborgs Stads Upphandlings Aktiebolag*, of 15 February 2013 (Judges Henrik Jermsten, Nils Dexe, Eskil Nord, Kristina Ståhl and Christer Silfverberg). This judgment has been presented on p. 88 in the second doctoral artide.

[127] Judgment of the Swedish Supreme Administrative Court in Case HFD 2013 ref. 5, *Frölunda El & Tele AB* v *Göteborgs Stads Upphandlings Aktiebolag*, of 15 February 2013, p. 5. The original Swedish version reads as follows: "Överprövningen tar inte sikte på upphandlingens materiella resultat utan endast på om myndigheten förfarit formellt korrekt och iakttagit de upphandlingsprinciper och förfaranderegler som anges i LOU."

competition is not possible for a court to do if it is legally barred from doing an effects based assessment and restricted to a purely formalistic review.

In my view therefore, if the Swedish Supreme Court were to apply the new competition principle of public procurement law, as established by Article 18 (1) of the New Classical Sector Directive of 2014 and implemented by Chapter 4, Article 2 of the New LOU of 2017, it may reach the opposite conclusion: In order for a court to assess whether there is an infringement of the competition principle, a court is not only entitled but also obliged to make an effects based assessment, a purely formalistic assessment is not sufficient.

12.8. The Dental Consumables Case of 2013 – Göteborg Administrative Court[128]

The county of Västra Götaland conducted a public procurement proceeding concerning dental consumables. The evaluation criterion was lowest price offered based on a secret basket of products containing a choice of 118 of the dental consumables subject to the procurement proceeding. The products were described by reference to a specific producer and trademark, not by the product's function. Moreover, the county had made clear that comparable products bearing a different trademark would not be accepted.

[128] Judgment of the Göteborg Administrative Court in Joined cases 3876-13 and 4205-13, *Plandent Forsbergs Dental AB* and *AB Nordenta* v *Västra Götalands läns landsting*, of 18 June 2013. This judgment has not been analysed in any of the artides belonging to this compilation thesis.

The Göteborg Administrative Court found that this infringed Chapter 6, Article 4 of the former LOU of 2008[129], according to which product description only in exceptional cases may be based on a specific trademark, and that it always should be possible to offer another product bearing another trademark if this product is equivalent.

What is interesting in the context of this thesis is that the Court's analysis was rather formalistic and did not contain any analysis of the purpose or principles of public procurement law. It is therefore interesting to note that the claimant, *Plandent Forssbergs Dental AB*, had submitted a legal opinion written by professor Ulf Bernitz in which these issues were raised as follows:

"The background to the provision of Chapter 6, Article 4 of the former LOU of 2008 are the EU public procurement directives and the purpose of public procurement proceedings to create open and effective competition. It is well known that a company has an exclusive right to its trademark. By requesting that a certain product shall have a specific trademark, other producers are excluded from being able to supply the product. This may be even clearer when the firm name of a certain producer is directly indicated. …

Finally, the county in its reply to the plaint (p. 8) refers to the statement of the Swedish Supreme Administrative Court in the Swedish Migration Agency Case of 2002 that in view of the different circumstances occurring in business life, also public procurement documents and evaluation models which are not optimally designed have to be accepted on the condition that the principles underlying Swedish public procurement legislation and EU-law are not infringed. However, the county's design of procurement in question is characterized by the fact that these principles have been infringed here. By demanding that almost all products must be of a certain trademark or produced by a certain producer, competition is excluded in the earlier stage of the supply chain, between producers in Sweden and the EU. As suppliers of dental products may not choose between comparable products, it becomes much more difficult for them to compete by good purchases, using rebates etc. This way, those suppliers which have their trademark or firm name directly indicated in the procurement documents are favoured and other suppliers are disfavoured.

[129] This provision corresponds to Chapter 9, Artide 6 in the New LOU of 2017.

The result has probably been that the county has been forced to pay a higher price for the products procured compared to a situation where the procurement would have been carried out in line with the rules of the LOU."[130]

In my view, the legal reasoning of professor Ulf Bernitz as to the role of competition, in particular as to the effect on competition at other levels of the supply chain and on other companies than those being parties to the judicial review, is very much in line with the new general competition principle of public procurement law, as established by Article 18 (1) of the New Classical Sector Directive of 2014 and implemented by Chapter 4, Article 2 of the New LOU of 2017.[131] Therefore, the Göteborg Administrative Court, while still reaching the same overall conclusions if it were to apply new competition principle of public procurement law, would arguably have referred to the new competition principle if it today were to give a new judgment on the same facts.

12.9. The Tigérs Case of 2014 – Göteborg Administrative Court of Appeal[132]

On 14 March 2014, the Göteborg Administrative Court of Appeal gave judgment in the *Tigérs* Case, dismissing a request for judicial review of a public procurement proceeding concerning carpet fitting services. One of the

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[130] Legal opinion of professor Ulf Bernitz dated 6 May 2013, submitted to the Göteborg Administrative Court in Joined cases 3876-13 and 4205-13.

[131] Moreover, the reasoning of professor Ulf Bernitz in his legal opinion is very much in line with the subsequent judgment of the CJEU in the Roche Lietuva Case of 2018 set out in section 13.13 below.

[132] Judgment of the Göteborg Administrative Court of Appeal in Case 4816-13, *Municipality of Arvika* v *Tigérs Plattsättning/TIGBRO* and *TD Golv*, of 14 March 2014 (Judges Göran Bodin, Viktoria Sjögren Samuelsson and Sonja Huldén). This judgment has been analysed on p. 50 in Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

legal grounds invoked by the claimant was that the framework agreement in question distorted competition and that the court therefore should rule that the public procurement proceeding should be recommenced.

Chapter 1, Article 9 of the Former LOU of 2008 applicable at the time of the judgment had the title "Public procurement principles". The provision did not include any reference to the framework agreement related competition principle embodied in Article 32 (2) of the Former Classical Sector Directive of 20024, *i.e.* the duty of contracting authorities not to use framework agreements in a way which distorts competition.

This judgment is very interesting as it, to my knowledge, constitutes the only judgment there a Swedish administrative court of appeal *explicitly* gave direct effect to the framework related competition principle contained in Article 32 (2) of the Former Classical Sector Directive of 2004. The Göteborg Administrative Court of Appel stated:

> "Framework agreements may not be used in an undue way or in a way which distorts competition (Article 32(2) of the Former Classical Sector Directive of 2004), but Tigérs has not put forward any facts which would prove such a use."[133]

If the court were to give judgment on the same facts today, it would not need to give direct effect to any provision of the New Classical Sector Directive. The new competition principle established by Article 18 (1) of the New Classical Sector Directive of 2014 has now been properly implemented by Chapter 4, Article 2 of the New LOU of 2017, titled "Public procurement principles". This provision now clearly stipulates:

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[133] Judgment of the Göteborg Administrative Court of Appeal in Case 4816-13, *Municipality of Arvika* v *Tigérs Plattsättning/TIGBRO* and *TD Golv*, of 14 March 2014, p. 3.

"The design of the procurement shall not be made with the intention … of artificially narrowing competition."

As set out in section 10.1 above, it is very difficult in practice for a claimant to prove that a contracting authority had an anti-competitive intention when designing the procurement documents. It is therefore very important to consider the wording of Recital 61 of the New Classical Sector Directive of 2014, according to which:

"Framework agreements should not be used … in such a way as to prevent, restrict or distort competition."

Therefore, in my view, a directive-compliant interpretation of Swedish public procurement law based on the wording of Recital 61, entails that a claimant does not need to prove any anti-competitive intention when the design of a *framework* agreement based public procurement proceeding has adverse effects on competition.

It would therefore be very interesting to see whether the Göteborg Administrative Court of Appeal, which in 2014 gave direct effect to the framework agreement related competition principle, if presented with the same facts, now would reaffirm that there still is a framework agreement related competition principle which, based on a directive-compliant interpretation, is not conditional on the claimant having to prove any anti-competitive intention of the contracting authority.

12.10. The School Kitchen Case of 2016 – Swedish Supreme Administrative Court[134]

The City of Nacka conducted a public procurement proceeding concerning school kitchen services. One of the mandatory requirements was that the total amount of a certain type of fat contained in a four weeks' menu should be stated in the tendering documents. Sodexo's offer did not contain this specific information and Sodexo's bid was therefore disqualified by the City of Nacka. Sodexo then initiated a judicial review.

Before the Swedish Supreme Administrative Court, Sodexo argued that it was easily possible for the contracting authority to calculate the amount of fat in question based on other information in Sodexo's offer. Sodexo argued that a deviation from the requirement would not confer any competitive advantage on any bidder. Therefore, Sodexo considered that it would be compatible with the principle of equal treatment and prescribed by the principle of proportionality to accept the offer. In its judgment, the Swedish Supreme Administrative Court found that it is, in principle never possible for a contracting authority to accept a bid which does not fulfill a given mandatory requirement, without infringing the principle of equal treatment.

I think that this judgment is well in line with the overly formalistic approach to public procurement judicial review taken by the Swedish Supreme

[134] Judgment of the Swedish Supreme Administrative Court in Case HFD 2016 ref. 37, *Sodexo* v *City of* Nacka, of 20 May 2016. This judgment has not been analysed in any of the artides belonging to this compilation thesis.

Administrative Court in earlier cases, such as the *Frölunda El Case of 2013* presented in section 12.7 above.

However, in my view, this judgment is not compatible with the new general competition principle of public procurement law, as established by Article 18 (1) of the New Classical Sector Directive of 2014 and implemented by Chapter 4, Article 2 of the New LOU of 2017. If the Swedish Supreme Administrative Court were to give judgment on the same facts again, giving full effect to the new competition principle, it would arguably take into consideration whether a deviation from a given mandatory requirement would confer any competitive advantage on any bidder.

12.11. The Medical Laboratory Services Case of 2016 – Sundsvall Administrative Court of Appeal[135]

The county of Norrbotten conducted a public procurement proceeding concerning medical laboratory services. One of the mandatory requirements was that certain information should be provided in a document separate from the main offer document. The contract was awarded to Abbot Scandinavia AB, which had not fulfilled the requirement in question. Roche Diagnostics Scandinavia AB initiated a judicial review. One of the legal issues before the Sundsvall Administrative Court of Appeal was whether the county of Norrbotten's refusal to disqualify Abbot constituted an infringement of the

[135] Judgment of the Sundsvall Administrative Court of Appeal in Case 1125-16, *Norrbottens läns landsting* and *Abobott Scandinavia AB* v *Roche Diagnostics Scandinavia AB*, of 26 September 2016. This judgment has not been analysed in any of the artides belonging to this compilation thesis.

principle of equal treatment. The Sundsvall Administrative Court found that the requirement, in spite of its wording, did not constitute a mandatory requirement (Swedish: obligatoriskt krav) but only an administrative requirement (Swedish: ordningskrav). Therefore, the Court found that the county of Norrbotten had not infringed the principle of equal treatment.

It is interesting to notice that the Sundsvall Administrative Court of Appeal gave its judgment in the *Medical Laboratory Services Case* just approximately four months after the Swedish Supreme Administrative Court's judgment in the *School Kitchen Case* presented in section 12.10 above.

In my view, the judgment of the Sundsvall Administrative Court of Appeal in the *Medical Laboratory Services Case* is more in line with the new general competition principle than the judgment of the Swedish Supreme Administrative Court in the *School Kitchen Case*. A formalistic approach to the principle of equal treatment, where any bidder missing to fulfill a mandatory requirement independently of how trivial its significance, constitutes an artificial narrowing of competition and is therefore difficult to reconcile with the new competition principle. In my view, only if a deviation from a mandatory requirement confers some kind of a competitive advantage (such as a competitive cost advantage set out in the Table-top Case of 2009 presented in section 12.5 above), it should be mandatory for a contracting authority to disqualify a bidder deviating from a given mandatory requirement. That means that deviations from purely administrative requirement should generally not lead to disqualification as set out by the Sundsvall Administrative Court of Appeal in its judgment in the *Medical Laboratory Services Case*, unless the deviation confers some kind of a competitive advantage.

12.12. The Carballos Klinic Case of 2018 – Swedish Supreme Administrative Court[136]

The County of Stockholm conducted a public procurement proceeding concerning specialized surgery. The County emphasized that it wanted to make it easier for small and medium-sized companies to compete, i.e. to make the procurement more pro-competitive.

The County therefore divided the contract in three different lots and provided that bidders were allowed to bid and compete for just one of the three lots, it was thus not necessary to submit bids for all the three lots. This provision made it indeed easier for small and medium-sized companies to participate in the public procurement procedure.

Moreover, the County stipulated that each bidder only could win one of the three lots. The County said that the purpose of dividing the procurement into different lots and stipulating that one supplier can only be awarded one lot was that the County wanted to ensure freedom of choice for patients and benchmarking between different undertakings. In its Question and Answers document, the County set out that a bidder is defined as the legal person submitting a bid. Hence, large corporations consisting of at least three subsidiaries were free to win all the three lots as long as they made sure that the bids were submitted by different legal entities within the same corporate

[136] Judgment of the Stockholm Administrative Court in Case 23148-17, *Carballos Klinic* v *Stockholms läns landsting*, of 3 July 208. Together with my colleague Johan Lidén, I acted as counsel to Carballos Klinic AB. This judgment has been analysed on p. 65 to 69.

group. In contrast, small and medium-sized companies consisting of one sole legal entity could win only one out of the three lots.

Carballos Klinic initiated a legal review proceeding before the Stockholm Administrative Court and, *inter alia*, argued that the County had breached the new competition principle.

In its judgment of 3 July 2018, the Stockholm Administrative Court reasoned as follows:

> "**Carballos has argued that the procurement infringes** the principle of equal treatment and **the competition principle.** The Administrative Court therefore has to assess whether Carballos has managed to prove that the county of Stockholm has infringed any of the principles or any other provision in the New LOU of 2017 and that this has caused or may cause the supplier harm.
>
> …
>
> The Administrative Court finds that it is not proven that the County of Stockholm by accepting offers from companies belonging to the same group has treated the suppliers in a way which infringes the principle of equal treatment. Moreover**, it has not been proven that the procurement has been designed with the intention of limiting competition so that certain suppliers are unduly favoured or disadvantaged**."[137] (emphasis added)

Carballos appealed to the Stockholm Administrative Court of Appeal, which rejected Carballos' application for leave to appeal.[138] Carballos then appealed to the Swedish Supreme Administrative Court and requested that the Swedish Supreme Administrative Court should grant leave to appeal and submit a request for a preliminary ruling from the CJEU as to, *inter alia*, the

[137] Judgment of the Stockholm Administrative Court in Case 23148-17, *Carballos Klinic* v *Stockholms läns landsting*, of 3 July 208, p. 8–9.

[138] Decision by the Stockholm Administrative Court of Appeal in Case 5670-18, *Carballos Klinic* v *Stockholms läns landsting*, of 3 July 2018.

two following question concerning the interpretation of the provisions related to the competition principle in the New Public Procurement Directive of 2014:

"Shall the notion of "intention" in Article 18 (1) second subparagraph of the New Public Procurement Directive be interpreted in accordance with the subjective intention of the contracting authority or shall the notion of "intention" be interpreted objectively in such a way that intention shall be deemed to be present when it is proven that a provision in a procurement document has the effect to distort competition?"

In its appeal to the Swedish Supreme Administrative Court, Carballos argued as follows:

"The new *general* competition principle is applicable as of 1 January 2017 and has the following wording according to Chapter 4 Article 2 of the New LOU:

"The design of a procurement shall not be made with the intention of excluding it from the scope of this Act, nor shall it be made with the intention of limiting competition so that certain suppliers are unduly favoured or disadvantaged."

This provision implements the new provision of Article 18 (1) second subparagraph in the New Classical Sector Directive 2014/24/EU:

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

As opposed to the framework related competition principle, the new general competition principle is not restricted to public procurement of framework agreements, but can be applied to all public procurement proceedings. For the new competition principle to be applicable the following two conditions need to be fulfilled:

(1) the design of a public procurement is made in such a way that objectively limits competition by unduly favouring or disadvantaging certain suppliers, and (2) that there is an intention to design the public procurement in such a way.

Carballos' main legal ground for its action before the Stockholm Administrative Court and the Stockholm Administrative Court of Appeal is that the county of Stockholm's choice to limit the amount of lots a small supplier with all activities within specialized surgery concentrated to one legal entity can be awarded without limiting the number of lots a large supplier with the same activities spread out in different subsidiaries can be awarded – constitutes an infringement of the competition principle because large suppliers de facto obtains an undue competitive advantage compared to smaller suppliers. It

should therefore be common ground that condition (1) is fulfilled as the design of the public procurement is made in such a way that objectively limits competition by unduly favouring or disadvantaging certain suppliers.

Whether condition (2) – intention – is fulfilled depends on whether intention should be interpreted in a subjective or an objective way.

The Parties agree that the county of Stockholm did not have any subjective intention to limit competition. On the contrary, it is common ground that the subjective intention of the county of Stockholm was to design the public procurement in a pro-competitive way. In case condition (2) – intention – should be interpreted based on the contracting authority's subjective intention, the measures undertaken by the county of Stockholm – to limit the amount of lots which can be awarded to each supplier based on the new provisions in Chapter 4, Article 15 of the New LOU – could not infringe the new general competition principle, as there is no subjective intention to limit competition.

If Carballos' understanding of the legal situation is correct, the notion of intention shall be interpreted objectively in such a way that the condition of intention is fulfilled, when it has been proven that a provision of the procurement documents entails a distortion of competition. In that case, the second measure undertaken by the county of Stockholm – to limit the amount of lots which can be awarded to each supplier based on the new provisions in Chapter 4, Article 15 of the New LOU – would infringe the new general competition principle as the condition of anti-competitive intention would be fulfilled from an objective perspective, independently of what subjective intention the county of Stockholm may have had.

It is therefore of paramount importance for the legal assessment in this regard whether the notion of intention in Article 18 (1) second subparagraph in the New Classical Sector Directive 2014/24/EU shall be interpreted on the basis of the subjective intention of the contracting authority or in such an objective way that the condition of anti-competitive intentions can be said to be fulfilled when a certain provision of the procurement documents has been proven to limit competition.

Whether the notion of intention should be interpreted in a subjective or objective way cannot be derived from the wording of the New Classical Sector Directive of 2014. Therefore, leave to appeal should be granted in this regard."

On 10 August 2018, the Swedish Supreme Administrative Court rejected Carballos' request to demand a preliminary ruling from the CJEU.[139] Moreover, the Court rejected Carballos' request for a leave to appeal. Hence, unfortunately, the important questions concerning the interpretation of the

[139] Decision by the Swedish Supreme Administrative Court in Case 4206-18, *Carballos Klinic* v *Stockholms läns landsting*, of 3 July 2018.

provisions related to the competition principle in the New Public procurement Directive of 2014 remain unanswered.

To my knowledge, the judgment of the Stockholm Administrative Court constitutes the first time that a Swedish court explicitly acknowledged that there is a new competition principle embodied in Chapter 4, Article 2 of the New LOU of 2017, which implements Article 18 (1) of the New Classical Sector Directive of 2014.

However, as set out in sections 10.1 and 12.9 above, the new competition principle would have very limited practical implications if a claimant has to prove any anti-competitive intention of contracting authorities related to framework agreements. Unfortunately, the Stockholm Administrative Court did not explicitly address this issue.

It is very important to consider the wording of Recital 61 of the New Classical Sector Directive of 2014, according to which "framework agreements should not be used … in such a way as to prevent, restrict or distort competition."

Therefore, in my view, a directive-compliant interpretation of Swedish public procurement law based on the wording of Recital 61, entails that a claimant does not need to prove any anti-competitive intention when the design of a *framework agreement* based public procurement proceeding has adverse effects on competition.

Hopefully, this issue will soon be explicitly addressed by a court faced with similar facts as the Stockholm Administrative Court in the Carballos Klinic Case of 2018.

12.13. The Roche Lietuva Case of 2018 – CJEU[140]

The Polyclinic for the Dainava District of Kaunas in Lithuania conducted a public procurement proceeding concerning medical diagnostic equipment and materials. The company Roche Lietuva UAB argued that the technical specifications in the procurement documents unreasonably restricted competition among suppliers due to their high specificity and in reality corresponded to the products of specific manufacturers of blood analysers. Roche Lietuva therefore initiated a judicial review procedure before Lithuanian Courts. Once the case reached the Supreme Court of Lithuania, that court requested a preliminary ruling from the CJEU on the interpretation of Article 42 (2) of Classical Sector Directive of 2014, according to which "technical specifications … shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition."

In its judgment, the CJEU stated as follows in this regard:

"Moreover, it appears from that provision that the Union legislation relating to technical specifications allows broad discretion for the contracting authority in the formulation of the technical specifications of a procurement contract.

That margin of appreciation is justified by the fact that the contracting authorities are better placed to know which supplies they need and to determine the requirements necessary to achieve the desired results.

Nonetheless, Directive 2014/24 sets certain limits that the contracting authority must comply with.

In particular, Article 42(2) of Directive 2014/24 requires that the technical specifications afford equal access of economic operators to the procurement procedure and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

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[140] Judgment of the CJEU in Case C-413/17, *Roche Lietuva UAB*, of 25 October 2018. This judgment has been presented on p. 61-62 in the second doctoral artide.

That requirement implements the principle of equality of treatment set out in the first subparagraph of Article 18(1) of that directive for the purpose of the formulation of technical specifications. According to this provision, contracting authorities are to treat economic operators equally and without discrimination and are to act in a transparent and proportionate manner.

As the Court has previously held, the principles of equality of treatment, non-discrimination and transparency are of crucial importance so far as concerns technical specifications, in the light of the risks of discrimination related either to the choice of specifications or their formulation (see, as regards Directive 2004/18, judgment of 10 May 2012, Commission v Netherlands, C-368/10, EU:C:2012:284, paragraph 62).

It is, in addition, stated in the second subparagraph of Article 18(1) of Directive 2014/24 that the design of a procurement is not to be made with the intention of excluding it from the scope of that directive or of artificially narrowing competition, and that competition is to be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

Similarly, recital 74 of Directive 2014/24 specifies that technical specifications should be 'drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator'. Also according to that recital, 'it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace'.

Complying with those requirements is all the more important when, as in the present case, the technical specifications listed in the procurement documents are formulated in a particularly detailed manner. Indeed, the more detailed the technical specifications, the higher the risk of favouring the products of a given manufacturer will be."[141] (emphasis added)

This judgment does not directly concern the new competition principle embodied in Article 18 (1) of the New Classical Sector Directive of 2014.[142]

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[141] Judgment of the CJEU in Case C-413/17, *Roche Lietuva UAB*, of 25 October 2018, para. 29-37.

[142] I should be noted that the CJEU similarly has referred to the provisions of Artide 18 (1) in a more recent case concerning the interpretation of the provisions of Artide 18 (2) concerning environmental, social and labour law obligations: In its judgment of 30 January 2020 in Case C-395/18, *Tim SpA* v *Consip SpA*, the Court said (para. 38): "In this respect, it should be noted that Artide 18 of Directive 2014/24, entitled 'Principles of procurement', is the first artide of Chapter II of that directive devoted to 'general rules' on public procurement procedures. Accordingly, by providing in paragraph 2 of that artide that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, the Union legislature sought to establish that requirement as a principle, like ***the other principles referred to in paragraph 1 of that article, namely the principles of*** equal treatment, non-discrimination, transparency, proportionality and prohibiting the exdusion of a contract from the scope of Directive 2014/24 or ***artificially narrowing competition***. It follows that such a requirement

The legal question at hand is how to interpret the provisions of Article 42 (2) of Classical Sector Directive of 2014, according to which "technical specifications … shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition." However, it is interesting to note that in doing so, the CJEU does explicitly take into consideration the wording of the legal basis for the new competition principle in the second subparagraph of Article 18 (1) of the New Classical Sector Directive of 2014, according to which "the design of a procurement is not to be made with the intention …of artificially narrowing competition." In my view, it is reasonable to regard the obligation not to design the technical specifications in a way that has anti-competitive effects as a specific application of the general competition principle, according to which the design of a procurement may not be made with the intention to artificially narrow competition by any means, such as for example by using anti-competitive technical specifications.

It would therefore be very interesting to see how the CJEU would have ruled if the facts of the case had been the other way round. If a supplier were to argue that the design of a given public procurement has the effect of artificially narrowing competition, the legal issue before the CJEU would instead be how to interpret the wording of Article 18 (1) of the New Classical Sector Directive of 2014, according to which "the design of a procurement is not to be made with the intention …of artificially narrowing competition." In view of the functional connections established by the CJEU in the *Roche Lietuva Case of 2018* between the general competition principle and the specific rules

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constitutes, in the general scheme of that directive, a cardinal value with which the Member States must ensure compliance pursuant to the wording of Artide 18(2) of that directive." (emphasis added)

concerning anti-competitive technical specification, the CJEU would arguably take into consideration the wording of Article 42 (2) of Classical Sector Directive of 2014, according to which "technical specifications … shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition", when determining the level of anti-competitive intention which would be required for applying the general competition principle.

It is clear from the judgment of the CJEU in the *Roche Lietuva Case of 2018* that the prohibition against the anti-competitive design of technical specifications is not conditional on proving any anti-competitive intention. In my view, the judgment of the CJEU in the *Roche Lietuva Case of 2018* can reasonably be interpreted in such a way that the CJEU found that the general prohibition against any anti-competitive design of public procurement under the new competition principle has the same function as the prohibition against anti-competitive design of technical specifications. From a practical and functional perspective it is difficult to see why certain ways of anti-competitive design should be treated differently, where some would not require anti-competitive intention (when using technical specifications to reduce competition) and others would require anti-competitive intention (when using means other than technical specifications having the same anti-competitive effects as technical specifications). When applying a teleological interpretation, therefore, the CJEU may find that there should be very low thresholds for finding that the condition of anti-competitive intention is fulfilled, for exampling by presuming anti-competitive intention once it is established that the design of a certain public procurement proceeding has the effect of artificially narrowing competition.

Chapter 13

What does it take to make the competition principle work not only in theory, but also in practice?

13.1. Need for a judgment from the Swedish Supreme Administrative Court and/or a preliminary ruling from the Court of Justice on how to interpret Article 18 (1) of the New Classical Sector Directive of 2014 as to the new *general* competition principle in EU public procurement law[143]

In the third edition of their leading commentary on the Swedish Public Procurement Act published in 2020[144], Helena Rosén Andersson et al argue that there is a new general competition principle in EU and Swedish public

[143] For the original legal analysis leading me to this conclusion, see p. 65-69 of Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

[144] Rosén Andersson, Helena, et al, *Lagen om offentlig upphandling – En kommentar* (Norstedts Gula Bibliotek, 3rd edition 2020).

procurement law. I am happy to note that they refer to my third main licentiate article on Public Procurement and Competition Law[145] published in Europarättslig Tidskrift in 2012, as follows from the following quote:

"The general view has been that the rules on public procurement aim at combatting obstacles to freedom of movements and that this shall promote sound competition. According to this view, contracting authorities are obliged to avoid taking measures which distort competition but not to take active measures which foster competition, compare Asplund et al., *Överprövning av Upphandling – och andra rättsmedel enligt LOU och LUF* (2012, p. 39 ff.). **However, in legal literature it has been argued that there is a competition principle – which goes beyond the general principles listed in Chapter 4, Article 1 of the New LOU – and that this principle obliges contracting authorities to actively take measures to ensure that the public procurement is pro-competitive, see *Moldén, Public procurement and competition law from a Swedish perspective – some proposals for better interaction,* Europarättslig Tidskift Nr 4 (2012) p. 598 ff. See also the judgment of the CJEU in C-213/07, Michaniki, para. 39. A failure to fulfil this obligation would therefore constitute an infringement of the public procurement rules in the same way as an infringement of the principle of transparency or equal treatment.** The Göteborg Administrative Court of Appeal gave in its judgment in Case 4816-13 [the *Tigérs* Case of 2014] direct effect to the framework agreement related competition principle embedded in the Former Classical Sector Directive of 2004. This judgment is well in line with what now follows from Chapter 4, Article 2 of the New LOU. Also the Stockholm Administrative Court of Appeal in its judgment in Case 6258-10 [The *Familjebostäder* Case of 2011] expressed the view that there is a competition principle by stating that the public procurement rules aim both at making use of competition in the individual public procurement proceeding and at developing effective competition."[146] (emphasis added)

Helena Rosén Andersson et al conclude that Chapter 4, Article 2 of the New LOU of 2017 does constitute a general competition principle, according to which a procurement may not be designed with the intention of limiting

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[145]Moldén's third main licentiate artide on 'Public Procurement and Competition Law from a Swedish Perspective – Some Proposals for Better Interaction' (2012) 15 *Europarättslig Tidskrift* 557-615, *see Appendix C.*

[146] Helena Rosén Andersson et al, *Lagen om offentlig upphandling – En kommentar* (Norstedts Gula Bibliotek, third edition 2020), p. 281-282.

competition so that certain suppliers are unduly favoured or disadvantaged.[147]

The new edition of the leading Swedish commentary edited by Helena Rosén Andersson, a leading public procurement law expert and judge at the Swedish Supreme Administrative Court, thus now clearly states that there is a new general competition principle within EU and Swedish public procurement law. This constitutes in itself an important first step towards making the competition principle work in in practice, as the commentary is widely used by Swedish public procurement law practitioners and judges.

However, the commentary does not address the crucial issue on how to interpret the concept of anti-competitive *intention*, which according to the wording of Chapter 4, Article 2 of the New LOU of 2017 constitutes a condition for applying the new general competition principle.

In their leading commentary on "EU Public Procurement Law" published in 2018, Michael Steinicke and Peter L. Vesterdorf argue the following in this regard:

> "The most problematic part of Article 18 (1), last sentence, is the reference to "intention". Including the subjective intention of the contracting authority when this entity prepares procurement or when making decisions in the course of the tendering procedure changes the provision and the application dramatically. It is extremely difficult to assess what exactly is the intention of a contracting authority for any given action. That assessment is difficult especially since most decisions could be ascribed to one or more legitimate reasons (e.g. the contracting could award a contract directly to a specific economic operator under the pretences that he thinks this is legitimate according to, inter alia, the rules on negotiated procedures without a prior notice even though this rule is not applicable). It would seem difficult to establish with any amount of certainty that the intention of the contracting authority is to circumvent the procurement rules. There are no indications as to how the interpretation of the intention must be conducted. It must be assumed that only when the intention of the contracting authority is clear from the context of the

[147] Helena Rosén Andersson et al, *Lagen om offentlig upphandling – En kommentar* (Norstedts Gula Bibliotek, third edition 2020), p. 281-282.

decision (of design or within the procedure) the provision will be applied. This leaves a very narrow window for application of Article 18 (1), last sentence."[148] (emphasis added)

In order to apply the competition principle not only in theory, but also in practice, there is therefore a need for the Swedish Supreme Administrative Court to grant a leave to appeal and to consider requesting a preliminary ruling from the CJEU in order to clarify the notion of anti-competitive *intention*.

13.2. Need for the Swedish Supreme Administrative Court to overturn its judgment in the Frölunda El Case of 2013 according to which a Swedish court may not take the effects of a public procurement proceeding into consideration – which makes it impossible to apply the competition principle in practice[149]

The far-reaching anti-effects and pro-formalistic approach taken by Swedish Supreme Administrative Court in the Frölunda El Case of 2013 presented in section 12.7 above, has recently been reaffirmed by the Göteborg Administrative Court of Appeal in its judgment of 16 April 2019 in the *OneMed Case of 2019*. The relevant reasoning reads as follows:

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[148] Michael Steinicke and Peter L. Vesterdorf (eds), Brussels Commentary on EU Public Procurement Law (C.H. Beck-Hart-Nomos, 2018), p. 329–330.

[149] For the original legal analysis leading me to this conclusion, see p. 87-91 of Moldén's second doctoral article on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

"The Swedish Supreme Administrative Court has in its judgment in Case RÅ 2002 ref. 50 [*The Swedish Migration Agency Case of 2002* presented in section 12.3 above] stated that in view of the different circumstances occurring in business life, also public procurement documents and evaluation models which are not optimally designed have to be accepted on the condition that the principles underlying Swedish public procurement legislation and EU-law are not infringed. Moreover, the Swedish Supreme Administrative Court has stated in its judgment in Case HFD 2013 ref. 5 [*The Frölunda El Case of 2013* presented above] that the judicial review procedure does not take the actual effects of a public procurement proceeding into consideration, it exclusively focuses on the issue of whether the contracting authority has acted correctly from a formal perspective and has adhered to the principles of public procurement and procedural rules indicated in the Swedish public procurement legislation."[150]

When applying EU public procurement law, Swedish judges may generally apply Swedish procedural rules. However, according to the EU principle of effectiveness, domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law.

As set out in this thesis, if certain conditions are fulfilled, suppliers have a right to request that an administrative court orders that a public procurement proceeding shall be recommenced in case it artificially narrows competition or, in case of a framework agreement, has the effect of distorting competition. What then if the judge in question applies the precedents in question, according to which "the judicial review procedure does not take the actual effects of a public procurement proceeding into consideration, it exclusively focuses on the issue of whether the contracting authority has acted correctly from a formal perspective and has adhered to the principles of public procurement and procedural rules indicated in the Swedish public procurement legislation"? There is a rather obvious risk that a judge applying

[150] Judgment of the Göteborg Administrative Court of Appeal in Case 4707-18, *One Med Sverige AB* v *County of Halland*, of 16 April 2019, p. 4.

these precedents would make it impossible or excessively difficult for the supplier to enforce the rights derived from EU law as to the framework related competition principle and the new general competition principle under Recital 61, respectively Article 18 (1) of the New Classical Sector Directive of 2014. Therefore, in my view, a Swedish judge should disregard the judgments of the Swedish Supreme Administrative Court in *the Swedish Migration Agency Case of 2002* and *the Frölunda El Case of 2013* in this respect as they infringe the EU principle of effectiveness.

When assessing whether a given public procurement proceeding infringes the framework related competition principle or the new general competition principle under Recital 61, respectively Article 18 (1) of the New Classical Sector Directive of 2014 it is necessary to also take the actual effects of a public procurement proceeding into consideration, it is in fact contrary to EU law just to exclusively focus on the issue of whether the contracting authority has acted correctly from a formal perspective.

Therefore, there is a need for the Swedish Supreme Administrative Court to explicitly overturn its judgment in the *Frölunda El Case of 2013*, according to which a Swedish court may not take the effects of a public procurement proceeding into consideration. Such a reversal is necessary for the new competition principle to be applied not only in theory, but also in practice.

13.3. Need for a judgment from the Swedish Supreme Administrative Court and/or a preliminary ruling from the Court of Justice on how to interpret Article 18 (1) of the New Classical Sector Directive of 2014 together with Recital 61 of that Directive as to the *framework related* competition principle which already had been introduced by Article 32 (2) of the Former Classical Sector Directive of 2004[151]

In the third edition of their leading commentary on the Swedish Public Procurement Act published in 2020, Helena Rosén Andersson et al argue that there still is a framework agreement related competition principle in EU and Swedish public procurement law, which is not conditional on proving any anti-competitive intention. I am happy to note that that they invoke my third main licentiate article on Public Procurement and Competition Law published in Europarättslig Tidskrift back in 2012, as follows from the following quote:

"Framework agreements and the basic principles

The basic principles for conducting a public procurement proceeding, which are listed in Chapter 4, Articles 1-3 of the New LOU of 2017, also apply to framework agreements. Article 32 (2) fifth subparagraph of the Former Classical Sector Directive of 2004 contained a general clause which stipulates that framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition. There is no

[151] For the original legal analysis leading me to this condusion, see p. 65-69 of Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

framework agreement specific general clause in the New Classical Sector Directive of 2014. **However, there is a competition principle among the basic principles laid down in Article 18 of the New Classical Sector Directive of 2014 which has been implemented by Chapter 4, Article 2 of the New LOU of 2017. The competition principle signifies that a procurement shall not be made with the intention of limiting competition so that certain suppliers are unduly favoured or disadvantaged.** The implications of the competition principle are set out in the commentary to the provisions of Chapter 4, Article 2 of the New LOU of 2017. Moreover, the competition principle is embodied in Recitals 60 and 61 of the New Classical Sector Directive of 2014. See also Article 33 (1) of the New Classical Sector Directive of 2014, which prescribes that framework agreements may be entered into if the procedures set out in the Directive have been adhered to. As it is furthermore indicated in recital 60 of the Classical Sector Directive of 2014 that the rules concerning framework agreements should be largely maintained, it is still important that the contracting authority takes the basic principles into consideration when designing framework agreements. This concerns both the contracting authority's intention as well as the actual effects of a given framework agreement. Large centralized framework agreements risk being anti-competitive, because only a limited number of suppliers may have the capacity to supply the volumes at hand, see *Moldén, Public procurement and competition law from a Swedish perspective – some proposals for better interaction,* Europarättslig Tidskift Nr 4 (2012) p. 557 ff."[152] (emphasis added)

However, in view of the uncertainties at hand, it is very important that the Swedish Supreme Administrative Court (or the corresponding court in any other EU jurisdiction) grants leave to appeal and considers requesting a preliminary ruling from the CJEU in order to clarify the issues in question.

[152] Helena Rosén Andersson et al, *Lagen om offentlig upphandling – En kommentar* (Norstedts Gula Bibliotek, third edition 2020), p. 418-419.

13.4. Need for the Swedish legislator to the insert the following explicit provision into Chapter 7 of the Swedish Public Procurement Act concerning framework agreements: "Framework agreements may not be used in such a way as to prevent, restrict or distort competition"[153]

As set out in section 12.12 above concerning the *Carballos Klinic Case of 2018*, the new general competition principle stipulated by Article 18 (1) of the New Classical Sector Directive of 2014 is currently very difficult to apply in practice. The reason for this is the condition of anti-competitive intention, which if it is to be interpreted in a subjective way, would be very difficult to prove for any supplier requesting a judicial review of a public procurement proceeding. The notion of anti-competitive intention therefore needs to be clarified, preferably by way of a preliminary ruling from the CJEU, before it could be regularly applied.

However, as pointed out by the Swedish Competition Authority in its legal opinion in the *The SKL Kommentus Printer and Copying Machines Case of 2012*[154], competition concerns are much more likely to occur when contracting authorities procure by way of (often very large) framework agreements as opposed to procuring by way of individual contracts, which are generally

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[153] For the original legal analysis leading me to this condusion, see p. 80 of Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

[154] See p. 46-49 of Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

economically less important and thus represent lower risk as to creating a distortion of competition. Therefore, it can be argued that there are good reasons for applying a considerably more limited general competition principle to contracts in general. Such contracts are much less likely to create distortions of competition and therefore it does make sense to apply the principle of competition only in those exceptional cases where the supplier actually can prove that the contracting authority had an anti-competitive intention.

However, as to framework agreements it does make sense that no anti-competitive intention is required and that, under Recital 61 of the New Classical Sector Directive it is sufficient for the supplier to prove anti-competitive effects. Therefore, for the vast majority of cases where the competition principle actually may be applicable – i.e. in cases of large framework agreements – it is not the new general competition principle but the framework agreement related competition principle established by the Former Classical Sector Directive of 2004 and reaffirmed by Recital 61 of the New Classical Sector Directive of 2014 which would be invoked by those suppliers which are aware of the provisions, which can be said to be rather unfortunately hidden in Recital 61.

Against this background, it is very unfortunate that the framework related competition principle, which is very relevant from a practical perspective, is not mentioned at all in the New LOU of 2017 as opposed to the new general competition principle, which from a practical perspective is much less relevant as it is conditional on proving anti-competitive intention within the contracting authority.

I therefore propose that the Swedish legislator should insert a new Article into Chapter 7 on framework agreements in the New LOU of 2017. A new provision, implementing Recital 61 of the New Classical Sector Directive should be inserted as the new Article 2 of the chapter having the following wording:

"Framework agreements may not be used in such a way as to prevent, restrict or distort competition."

13.5. Need for the Swedish Competition Authority to be given legal authority to take legal action against anti-competitive design of public procurement proceedings – as it used to have until 2008[155]

Back in 1997, The Swedish Supreme Administrative Court gave judgment in a case which clearly shows the importance attributed to competition in Swedish public procurement law twenty five years ago. The County Work Council of Älvsborg had conducted a public procurement proceeding concerning certain educational services. The public procurement documents contained a mandatory requirement for all tenderers to disclose their own costs as to teachers, premises, administration etc. The Swedish Supreme Administrative Court stated as follows:

"As to the requirement of specifying the costs in question, the Swedish Council for Public Procurement as well as the Swedish Competition Authority have stated that the

[155] For the original legal analysis leading me to this conclusion, see p. 83-87 of Moldén's second doctoral artide on 'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective', (2020) 23 *Europarättslig Tidskrift 1-100 as published on www.ert.se*, see *Appendix J*.

requirement is anti-competitive. The Swedish Supreme Administrative Court shares this view and therefore finds that it is contrary to Chapter 1, Article 4 of the [former] Swedish Public Procurement Act of 1993 to request the cost specification in question."

For this reason the Swedish Supreme Administrative Court decided that the public procurement proceeding had to be recommenced. The judgment was based on the provisions of Chapter 1, Article 4, first paragraph, of the former Swedish Public Procurement Act of 1993[156], which 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." The Swedish Public Procurement Act of 1993 thus contained a very clear obligation on contracting authorities to make use of the existing possibilities for competition.

Moreover, it is interesting to note that at that time the Swedish Competition Authority had a clear and explicit legal competence under public procurement law to intervene against contracting authorities which acted in an anti-competitive way when procuring. The Swedish Competition Authority was entitled to file a plaint at the former Swedish Market Court, which then could prohibit a specific anti-competitive action by a contracting authority. This legal competence followed from Article 3 of the Act on Intervention against Improper Behaviour Related to Public Procurement[157] enacted in 1994, which reads as follows in this regard:

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[156] Lag (1992:1528) om offentlig upphandling.

[157] Lag (1994:615) om ingripande mot otillbörligt beteende vid upphandling (LIU). The author of this Artide worked from 2006 to 2011 at the Competition Department 3 of the Swedish Competition Authority, which was responsible for enforcing this legislation until it was abolished in 2008.

"**Intervention against improper behavior**

The Swedish Market Court, may upon application [by the Swedish Competition Authority] prohibit a contracting authority conducting a public procurement proceeding to act in a way which, in an overall assessment, shall be regarded as improper, because (1) a contracting authority significantly discriminates against a supplier, either in relation to the activities carried out by the contracting authority itself or in relation to another supplier, or (2) the behavior in any other way significantly distorts the conditions for competition related to the procurement proceeding." (author's translation, emphasis added)

When the former LOU of 1993 was replaced by the Former LOU of 2008, the explicit obligation to make use of the existing possibilities of competition when following the principle of acting in a businesslike way disappeared from the public procurement act, making place for the five established EU general principles of public procurement. Moreover, in the same year of 2008, the Act on Intervention against Improper Behaviour Related to Public Procurement of 1994 was repealed, after having been quite rarely applied during its last years of existence.

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**."[158] (my translation and emphasis)

This view has for a long time been treated as a truism in the Swedish public procurement community. However, as this thesis has tried to show, this is not really true anymore. Contracting authorities cannot take competi-

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

tion for granted and just utilize competition at hand. In fact, contracting authorities are not only passive market spectators but active market participants whose actions may significantly affect market conditions and competition. The competition principle 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. One of the most interesting judgments in this regard is the *The Familjebostäder Case of 2011*. The Stockholm Administrative Court of Appeal has in February 2011, while applying the Former LOU of 2008, stated the following as to the role of competition in 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."[159] (my translation and emphasis)

[159] 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.

If the main aim of the Swedish Public Procurement Act, LOU, is indeed to foster competition, it has the same main purpose as the Swedish Competition Act. Competition law is mainly enforced by way of public enforcement, i.e., by the Swedish Competition Authority, the European Commission and other national competition authorities, and only to a minor part by way of private enforcement by individual companies. In contrast, the system of remedies under EU public procurement law is to a very large extent based on supplier review, where the supplier has the right to seek review of award decisions through a competent review body[160], i.e. a system of private enforcement. Public enforcement is focused on cases of illegal direct awards, where the Swedish Competition Authority has an explicit right respectively duty to intervene (Chapter 21 of the New LOU of 2017).

In view of the renewed focus on competition in the new LOU of 2017, the question arises which competence, if any, the Swedish Competition Authority currently has to intervene against artificial narrowing of competition in general, respectively against anti-competitive framework agreements in particular. In this regard it is important to note the judgment of the Swedish Supreme Administrative Court of 10 December 2018 in Case HFD 2018 ref. 71. The Swedish Competition Authority had conducted an investigation against a number of municipalities purchasing waste disposal services from a company they owned together. The Swedish Competition Authority adopted a decision stating that the purchases infringed Swedish public procurement law as the Teckal-criteria for in-house purchases were not fulfilled. The Swe-

[160] See Michael Steinicke and Peter L. Vesterdorf (eds), Brussels Commentary on EU Public Procurement Law (C.H. Beck-Hart-Nomos, 2018), p. 1395.

dish Supreme Administrative Court found that the Swedish Competition Authority was not entitled to take a decision declaring that a certain behavior infringes public procurement law, referring to a statement in the preparatory works that the Swedish Competition Authority should not be given such a competence (prop. 2009/10:180 p. 218). Therefore, the Supreme Administrative Court annulled the decision of the Swedish Competition Authority.

The effect of this precedent is that is now clear that the Swedish Competition Authority currently has no formal competence to prohibit any anti-competitive behavior by a contracting authority under public procurement law. It is therefore proposed that the Swedish legislator should consider to re-enact a formal competence for the Swedish Competition Authority to intervene against infringements of the new general competition principle and the framework related competition principle, in a way similar to the formal competence the Swedish Competition Authority had until 2008 under the Act on Intervention against Improper Behaviour Related to Public Procurement of 1994. This proposal is well in line with the proposals made by the Swedish Competition Authority in a recent memorandum of 1 July 2019, according to which the Authority should be granted a general legal competence to prohibit any behavior by a contracting authority which infringes public procurement law.

14 TABLE OF CASES

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Part II:
The eight earlier licentiate articles

APPENDIX A:

FIRST MAIN LICENTIATE ARTICLE

'Mandatory Supply of Interoperability Information: The Microsoft Judgment'

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A

Mandatory Supply of Interoperability Information: The *Microsoft* Judgment

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Abstract

The judgment of the Court of First Instance in Microsoft *represents a major success for the European Commission in its fight against abuses of a dominant position. The Court upholds the Commission's findings that Microsoft abused its dominant position by refusing to supply interoperability information that is indispensable for competitors to be able to viably compete in the work group server operating system market. Moreover, the Court upholds the record fine of approximately EUR 497 million. According to the Court, the judgment does not contain any legal novelty, as it simply applies earlier* Magill/IMS Health *case law. However, it may be argued that the judgment does contain a legal novelty as to the scope of the so-called new product condition. Specifically, it may be argued that the judgment considerably diminishes the scope for a dominant firm to rely on intellectual property rights as a defence in antitrust proceedings concerning the abuse of a dominant position.*

Keywords: abuse of a dominant position, intellectual property rights, mandatory supply of interoperability information, essential facility, new product condition, *Magill/IMS* case law.

1. INTRODUCTION

On 17 September 2007, the Court of First Instance delivered its judgment in *Microsoft Corp.* v. *Commission of the European Communities* ('the *Microsoft* judgment').[1] On 22 October 2007, Microsoft announced that it would not appeal to the European Court of Justice, bringing to an end a lengthy and complex antitrust proceeding initiated by a complaint by Microsoft's competitor Sun Microsystems, Inc. ('Sun') in 1998.

The Court of First Instance ('the Court') upheld the Commission's original *Microsoft* decision[2] of 24 March 2004 as to the substance matter and confirmed that the Commission was entitled to impose a record fine of approximately EUR 497 million on Microsoft. This fine relates to two separate infringements of EU antitrust law committed by Microsoft: (i) Microsoft's refusal to supply interoperability information that is indispensable for competitors to be able to viably compete in the work group server operating system market; and (ii) Microsoft's tying of Windows Media Player to the Windows operating system.

As follows from its title, this article will focus exclusively on the first infringement relating to Microsoft's refusal to supply interoperability information.[3] Moreover, this article will only deal with issues of EU antitrust law, hence it will not cover Microsoft's argument – which was not accepted by the Court – that the Commission's decision infringed the TRIPS Agreement.[4]

It should be noted that Microsoft's lawyers were successful on one important procedural issue. The Court in fact annulled the Commission's decision as to the appointment of a special trustee to monitor Microsoft's compliance with its obligations under the decision. The Court found that the Commission had no legal ground for conferring far-reaching powers to the trustee nor for obliging Microsoft to finance the monitoring costs. However, this procedural issue falls outside the scope of this article and will not be analysed further.

Moreover, on 27 February 2008, the Commission decided to impose a penalty of EUR 899 million on Microsoft for non-compliance with the Commission's decision of March 2004 as to the obligation to supply interoperability information

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[1] Case T-201/04 *Microsoft* v. *Commission* [2007].

[2] Case COMP/C-3/37.792 – *Microsoft* [2005] 4 *CMLR* 965 ('the Commission's decision').

[3] For a comprehensive article covering all aspects of the *Microsoft* judgment, see David Howarth and Kathryn McMahon, '"Windows has Performed an Illegal Operation": The Court of First Instance's Judgment in Microsoft v Commission', 29 *ECLR* (2008) p. 117. For an economic analysis, see François Lévêque, 'Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft case', 28 *World Competition* (2005) p. 71.

[4] For an article on this issue, see Tu T. Nguyen and Hans Henrik Lidgard, 'The CFI Microsoft Judgment and TRIPS Competition', *Currents International Trade Journal* (2008 forthcoming).

on reasonable terms.[5] However, any further analysis of this decision is outside the scope of this article.

This article will start out by providing a quick overview of what the *Microsoft* case is all about, followed by a brief presentation of the relevant EU legislation and earlier case law, namely the *Oscar Bronner*, *IBM*, *Tetra Pak II*, *Magill* and *IMS Health* cases. Moreover, some basic features of the partly parallel US *Microsoft* case will be presented as to the obligation to supply interoperability information. Then, the reader will be provided with an overview of the basic facts of the *Microsoft* case, in particular regarding the relevant technical features of the software industry.

After this preparatory exercise, we will come to the main part of the article, in which I will present the different legal approaches taken by the Court as opposed to the Commission and my own views as to what I think are the real novelties of the *Microsoft* judgment. Moreover, I will discuss one potential drawback of the *Microsoft* judgment, namely the risk of the Court-imposed information exchange spilling over into anti-competitive cooperation in other areas. Finally, I will discuss where the *Microsoft* decision and judgment stand in relation to the Commission's ongoing project aimed at a 'more economic approach' in cases concerning abuse of a dominant position.

2. WHAT IS THIS CASE ALL ABOUT? THE COMMISSION'S THEORY OF HARM

The *Microsoft* judgment consists of 174 pages, and the Commission uses no less than 301 pages to formulate its decision. Fortunately, in this jungle of 475 pages, there are two recitals in which the Commission sets out its theory of harm underlying the entire procedure very clearly. These recitals are reproduced here:

> As regards the refusal to supply abuse, Microsoft has engaged in a *general pattern of conduct* which focuses on the creation and sole exploitation of a range of privileged connections between its dominant client PC operating system and its work group server operating system, and on the disruption of previous levels of interoperability. The interoperability information at stake is indispensable for competitors to be able to viably compete in the work group server operating system market.
>
> Microsoft's abuse enables it to extend its dominant position to the market for work group server operating systems. This market is in itself of significant value: it concerns products that are part of the basic infrastructure used by office workers around the world in their day-to-day work. In addition, capturing the work group server operating system market is liable to have further

[5] Commission press release IP/08/318 of 27 February 2008.

> effects detrimental to competition. First, it would erect further barriers to entry in the client PC operating system market and limits the risk of a change of paradigm that could strip Microsoft's overwhelming dominance on the client PC operating system market of its competitive importance. Second, it would provide a bridgehead from which Microsoft could further leverage its position into other areas of the server industry.[6]

One striking feature of the *Microsoft* case is that the Commission not only had a theory of harm by leveraging but that it also had convincing evidence that the senior management of Microsoft in fact explicitly promoted the very leveraging on which the Commission built its case. The Court thus observes that a number of internal documents confirmed that 'Microsoft made use, by leveraging, of its dominant position on the client PC operating systems market to strengthen its position on the work group server operating systems market.'[7]

For example, Mr Bayer, a senior director of Microsoft, sent an e-mail to Mr Madigan, another senior director of Microsoft, in which he stated that '[Microsoft] has a huge advantage in the enterprise computing market by leveraging the dominance of the Windows desktop'.[8]

Another e-mail between the two senior directors of Microsoft contains the following passage: 'Dominance on the server infrastructure on the Internet is a tougher nut to crack [but] we just might be able to do it from the enterprise out if we could own the enterprise (which I think we can).'[9]

The Court finds that 'it is clear that the most senior directors of Microsoft regarded interoperability as a tool in that leveraging strategy.' It cites the following extract from a speech given by Mr Gates in 1997, the year before Sun's complaint to the Commission: 'What we are trying to do is use our server control to do new protocols and lock out Sun and Oracle specifically … Now, I don't know if we'll get to that or not, but that's what we are trying to do.'[10]

3. RELEVANT LEGISLATION

3.1 **Article 82 EC**

Article 82 EC prohibits the abuse of a dominant position. In particular, Article 82(b) of the Treaty provides that abuse as prohibited by that article may consist in limiting technical development to the prejudice of consumers.

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6 The Commission's decision, recitals 1064-1065.
7 The *Microsoft* judgment, para. 1347.
8 Ibid.
9 Ibid., at para. 1348.
10 Ibid., at para. 1349.

The exact wording of the provision is as follows:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> …
>
> (b) limiting production, markets or technical development to the prejudice of consumers; …

3.2 The Software Directive

The issue of interoperability is addressed in the Council Directive of 14 May 1991 on the legal protection of computer programs ('the Software Directive'),[11] which harmonises copyright protection of computer programs in the Member States. Article 6 of the Directive stipulates that the authorisation of the holder of a copyright over a computer program may not be required for the decompilation of parts of that program, where this is 'indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs'. This is subject to certain conditions, in particular that the independently created program shall not be 'substantially similar in its expression' to the decompiled program.[12]

The Software Directive contains a number of definitions on interoperability and related expressions. As will be set out below in section 6.4, these definitions were subject to dispute between Microsoft and the Commission. They are therefore reproduced here:

> Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;
>
> Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as 'interfaces';

---

[11] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *OJ* 1991 L 122.

[12] See the Commission's decision, recital 746.

> Whereas this functional interconnection and interaction is generally known as 'interoperability'; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.[13]

4. EARLIER EU CASE LAW

4.1 The IBM Undertaking (1984)

In the case that led to the IBM Undertaking,[14] IBM was alleged to hold a dominant position for the supply of two key products, the central processing unit and the operating system, for its most powerful range of computers, the IBM System/370. The Commission objected, *inter alia*, to IBM's practice of failing to supply so-called 'plug-compatible manufacturers' in sufficient time with the technical information needed to permit their products – which competed with IBM's own products – to be used with System/370.

As part of that undertaking, IBM agreed to disclose, in a timely manner, sufficient interface information to enable competing companies in the Community to attach both hardware and software products of their design to System/370. Furthermore, IBM agreed to disclose adequate and timely information to competitors to enable them to interconnect their systems or networks with IBM's System/370 using a set of network protocols which IBM had developed, its 'Systems Network Architecture'.

4.2 *Magill* (1995)

Magill concerned the refusal of TV broadcasters to license intellectual property in the form of (copyright-protected) programme listings. The Court of Justice stated that 'the refusal by the owner of an exclusive right [copyright] to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position'.[15] It pointed out, however, that 'the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct'.[16] On this basis, the Court of Justice upheld the

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[13] Recitals 10, 11 and 12 of the Software Directive.

[14] This description of the IBM Undertaking is taken from the Commission's decision, recitals 737-738.

[15] Judgment in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v. *Commission* [1995] *ECR* I-743, at para. 49. This description of the *Magill* judgment follows, slightly abbreviated, the description given in the *Microsoft* decision, recital 550-551.

[16] Judgment in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] *ECR* I-743, at para. 56.

Commission's decision (and the judgment of the Court of First Instance), which mandated compulsory licensing of the right to reproduce the copyrighted programme listings.

Three sets of exceptional circumstances were identified in *Magill*. First, the Court of Justice underlined that the dominant undertakings' refusal prevented the appearance of a new product that the dominant undertakings did not offer and for which there was a potential consumer demand. As such, the refusal was inconsistent in particular with Article 82(b) EC, which provides that abuse as prohibited by Article 82 of the Treaty may consist in 'limiting production, markets or technical development to the prejudice of consumers'. Second, the Court of Justice pointed out that the conduct in question enabled the dominant undertakings to reserve 'to themselves the secondary market of weekly television guides by excluding all competition on that market'. Third, the refusal was not objectively justified.

4.3 *Tetra Pak II* (1996)

In addition to the *IBM* case mentioned above, the requirement to offer interoperability in order to enable competition on the merits to unfold played a role in *Tetra Pak II*. In that case, the Commission not only considered the contractual tying in which Tetra Pak had engaged to be abusive and required its termination but also decided that Tetra Pak 'shall inform any customer purchasing or leasing a machine of the specifications which packaging cartons must meet in order to be used on its machines'.[17] The Court of First Instance and the Court of Justice upheld the Commission's decision.

4.4 *Oscar Bronner* (1998)

In *Bronner*,[18] a preliminary ruling on the basis of Article 234 EC, access to a nation-wide home-delivery scheme for newspapers was at stake. The Court of Justice concluded that, in that specific case, there was no obligation to deal pursuant to Article 82 EC, finding that access to the scheme was not indispensable for Bronner to stay in the newspaper market.

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[17] See Article 3(5) of Commission Decision 92/163/EEC and the judgment of the Court of First Instance in Case T-83/91 *Tetra Pak II* [1994] *ECR* II-755, at para. 139. This description of the *Tetra Pak* case is taken from the *Microsoft* decision, recital 742.

[18] Judgment in Case C-7/97 *Bronner* [1998] *ECR* I-7791. This description of the *Bronner* judgment is taken from the *Microsoft* decision, recital 553. For an economic analysis of the *Bronner* judgment, see Mats A. Bergman, *When Should an Incumbent Be Obliged to Share its Infrastructure with an Entrant Under the General Competition Rules?*, Working Paper, Department of Economics, Uppsala University (September 2003), available at: <http://www.nek.uu.se>.

4.5 ***IMS Health* (2004)**

In *IMS Health*,[19] the Court of Justice again ruled on the conditions under which a refusal by an undertaking holding a dominant position to grant to a third party a licence to use a product protected by an intellectual property right might constitute abusive conduct within the meaning of Article 82 EC.

The Court of Justice confirmed that, according to settled case law, the exclusive right of reproduction formed part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of that position. The Court of Justice also observed that it was clear from that case law that the exercise of an exclusive right by the owner might, in exceptional circumstances, involve abusive conduct. After reciting the exceptional circumstances found to exist in *Magill*, the Court of Justice held that it followed from that case law that, in order for the refusal by an undertaking that owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it was sufficient that three cumulative conditions be satisfied, namely, that the refusal prevents the emergence of a new product for which there is a potential consumer demand, that it is unjustified and that it is such as to exclude any competition on a secondary market.

It should be noted that the Court of Justice rendered its judgment in *IMS Health* on 29 April 2004, that is, well after the Commission's *Microsoft* decision of 24 March 2004.

5. THE US *MICROSOFT* CASE (2002)

In parallel with the Commission's investigation, Microsoft was subject to an investigation for violation of US antitrust legislation.[20]

In 1998, the United States of America, twenty states and the District of Columbia brought proceedings against Microsoft under the Sherman Act and the respective states' own antitrust legislation. Their complaints concerned the

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[19] Judgment in Case C-418/01 *IMS Health* [2004] *ECR* I-5039. The description of this case has, slightly abbreviated, been taken from the *Microsoft* judgment, recitals 329-330. For an in-depth analysis of this judgment and earlier related case law, see Joost Houdijk, 'The *IMS Health* Ruling: Some Thoughts on its Significance for Legal Practice and its Consequences for Future Cases such as *Microsoft*', 6 *EBOR* (2005) p. 467. See also Luca Prete, 'From *Magill* to *IMS*: Dominant Firms' Duty to License Competitors', 15 *European Business Law Review* (2004) p. 1071.

[20] This description of the US *Microsoft* case is taken from the *Microsoft* judgment, recitals 51-58. For an in-depth analysis of the US *Microsoft* case, see David S. Evans, Albert L. Nichols and Richard Schmalensee, '*United States* v. *Microsoft*: Did Consumers Win?', 1 *Journal of Competition Law and Economics* (2005) pp. 497-539.

measures taken by Microsoft against Netscape's Internet Navigator and Sun's Java technologies.

After the US Court of Appeals for the District of Columbia Circuit, on appeal by Microsoft against the judgment of 3 April 2000 of the US District Court for the District of Columbia, had given its judgment on 28 June 2001, Microsoft reached a settlement with the US Department of Justice and the Attorneys General of nine states in November 2001, in which two types of commitments were given by Microsoft.

The commitment relevant for the present article consisted in Microsoft agreeing to draw up the specifications of the communication protocols used by the Windows server operating systems in order to interoperate, that is to say, to make them compatible with the Windows client PC operating systems and to grant third parties licences relating to those specifications on specific conditions.

Those provisions were confirmed by a judgment of the District Court of 1 November 2002. On 30 June 2004, the Court of Appeals, on appeal by the State of Massachusetts, affirmed the judgment of the District Court of 1 November 2002. Pursuant to the US settlement, the Microsoft Communications Protocol Program was set up in August 2002, setting out the details for how Microsoft was to supply interoperability information (see below under section 6.4).

6. THE FACTS OF THE EU *MICROSOFT* CASE

6.1 The operational part of the decision as upheld by the Court of First Instance

The main operational part of the Commission's decision as upheld by the Court reads as follows:

Article 2

> Microsoft Corporation has infringed Article 82 of the Treaty and Article 54 of the EEA Agreement by:
>
> (a) refusing to supply the *Interoperability Information* and allow its use for the purpose of developing and distributing work group server operating system products, from October 1998 until the date of this Decision;
> (b) making the availability of the *Windows Client PC Operating System* conditional on the simultaneous acquisition of *Windows Media Player* from May 1999 until the date of this Decision.[21]

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21 As mentioned in the introduction, the second infringement – the tying of Windows Media Player to the Windows Client PC Operating System – will not be analysed further in this article.

Article 5

As regards the abuse referred to in Article 2 (a):

(a) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, make the *Interoperability Information* available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms,[22] allow the use of the *Interoperability Information* by such undertakings for the purpose of developing and distributing work group server operating system products; …

6.2 Technical and historical background

In a modern office, computers are linked together in a network controlled by one or more servers. A computer that can be linked to such a network is called a client PC. The software controlling the basic functions of a client PC or a server is referred to as an operating system. If a given network runs on a Microsoft operating system, the network is called a Windows work group network and may also be referred to as a Windows domain.

The Commission's decision focuses on Microsoft's Windows 2000 generation of operating systems, while observing that the essential characteristics of those systems are similar to those of the next generation of systems (namely the Windows XP Home Edition and Windows XP Professional operating systems for client PCs and the Windows 2003 Server operating system for servers).[23] The operating system preceding the Windows 2000 generation of operating systems was the Windows NT 4.0 operating system.

According to the Commission's decision, a historic look at the work group server operating system market shows that Microsoft entered this market relatively recently. Customers had started to build work group networks that contained non-Microsoft work group servers and Microsoft's competitors had a distinct technological lead. The value that their products brought to the network also augmented the client PC operating system's value in the customer's eyes and therefore Microsoft – as long as it did not have a credible work group server operating system alternative – had incentives to have its client PC operating system interoperate with non-Microsoft work group server operating systems. While entering the work group server operating system market, pledging support

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[22] Providing access on reasonable and non-discriminatory terms (RAND) is quite a complex concept that is beyond the scope of this article. For an in-depth analysis of the RAND concept, see Damien Geradin and Miguel Rato, 'Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND', 3 *European Competition Journal* (2007) p. 101.

[23] See the *Microsoft* judgment, para. 164.

for already established technologies was important in gaining a foothold and the confidence of the customers.[24]

Once Microsoft's work group server operating system gained acceptance in the market, however, Microsoft's incentives changed and holding back access to information relating to interoperability with the Windows environment started to make sense. According to the Commission's decision, when moving from the Windows NT 4.0 operating system to the Windows 2000 operating system, Microsoft then engaged in a strategy of diminishing previous levels of supply of interoperability information.[25]

6.3 To clone or not to clone: the crucial difference between implementations and specifications of protocols

In the *Microsoft* judgment, the word clone (including 'cloning', 'clones' and 'cloned') appears no less than twenty-three times. Microsoft's strategy seems to have been to make this a case about cloning. Many people will think about the famous 'Dolly the Sheep', whose cloning gave birth to a number of cloned Dollies. Analogously, forcing Microsoft to provide interoperability information would give birth to a number of Dolly-style cloned work group server operating systems being functionally identical to the original, that is, Microsoft's own operating system. At first sight, such cloning does not seem to make any common sense at all.

In order to understand Microsoft's and the Commission's opposite views as to whether the mandatory supply of interoperability information amounts to functional cloning, it is important to note how interoperability information is defined by the Commission and the Court:

> For the purposes of the contested decision, 'interoperability information' is the 'complete and accurate specifications for all the protocols [implemented] in Windows work group server operating systems and … used by Windows work group servers to deliver file and print services and group and user administrative services, including the Windows domain controller services, Active Directory services and 'group Policy' services to Windows work group networks' (Article 1(1) of the contested decision).[26]

The Court points out that, in its decision, the Commission emphasises that the refusal in question does not relate to Microsoft's 'source code' but only to specifications of the protocols concerned, that is to say, to a detailed description of what the software in question must achieve, in contrast to the implementations,

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[24] See the Commission's decision, recital 587.
[25] Ibid., at recital 588.
[26] The *Microsoft* judgment, para. 37.

consisting of the implementation of the code on the computer. The Commission states, in particular, that it 'does not contemplate ordering Microsoft to allow copying of Windows by third parties'.[27]

According to the Commission's decision,[28] competitors that obtain specifications of protocols still need to spend significant amounts of time and money to produce their own source code to implement the specifications of the protocols. Therefore, as upheld by the Court,[29] the Commission found that Microsoft was wrong to argue that the decision would allow Microsoft's competitors to copy or clone Microsoft's products.

6.4 The two main alternative levels of interoperability set out in the *Microsoft* decision

6.4.1 *Microsoft's Communications Protocols Licensing Program*

In September 2002, Microsoft launched the Communications Protocols Licensing Program in order to implement the US judgment set out above in section 5. The relevant provision of the US judgment provides that

> Microsoft shall make available for use by third parties, for the sole purpose of interoperating or communicating with a Windows Operating System Product, on reasonable and non-discriminatory terms … any Communications Protocol that is … (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product.[30]

Microsoft therefore argued that the Commission's 'allegations about interoperability with Windows client operating system have been overtaken by the passage of time'. According to Microsoft, this was so because

> 'the communications protocol licensing program that Microsoft created pursuant to the U.S. Final Judgment allows any vendor of server operating systems to license any or all of the communications protocols that Windows server operating systems use to communicate with Windows client operating systems'. Microsoft concluded from this that 'there is no client-to server interoperability issue, to the extent there ever was one'.[31]

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27 Ibid., at para. 40.
28 See the Commission's decision, recitals 719-721.
29 See the *Microsoft* judgment, paras. 657-658.
30 See the Commission's decision, recital 274.
31 Ibid., at recital 688.

According to the Commission's decision, Microsoft's argument was based on an inadequate distinction between 'client-to-server interoperability' and 'server-to-server interoperability'. In a Windows work group network, client-to-server and server-to-server interoperability are tightly linked to one another. The Communications Protocol Licensing Program only provides for the disclosure of protocols used for communication between a Windows client PC and a Windows work group server. The Program contractually excludes use of the disclosure for any server-to-server communication. This provision renders integration of a non-Microsoft work group server in the Windows domain architecture impossible. The Commission therefore concluded that the Communications Protocols Licensing Program does not resolve the problem of insufficient disclosure of interoperability information by Microsoft.[32]

6.4.2 *The Software Directive*

In its response of 17 November 2000 to the first statement of objections, Microsoft stated that the degree of interoperability apparently required by the Commission is not consistent with Community law and does not exist in the market. Relying, more particularly, on the 10th recital (in the English and French versions) to Directive 91/250 set out above in section 3.2, Microsoft submitted that 'full interoperability is available to a developer of server operating systems when all of the functionality of his program can be accessed from a Windows client operating system'. Microsoft maintained that the Commission wrongly defines interoperability much more broadly when it considers that, for there to be interoperability between two software products, all the functionalities of both products must function correctly. That, in Microsoft's contention, is tantamount to requiring 'plug-replaceability' or 'cloning'. In order to achieve full interoperability, it is sufficient that Microsoft should disclose the interfaces exposed by the Windows client PC operating systems which developers of competing server operating systems need in order to make the functionalities of those systems available to users of Windows client PCs.[33]

The Court finds that the concept of interoperability employed in the Commission's decision – according to which interoperability between two software products means the capacity for them to exchange information and to use that information mutually in order to allow each of those software products to function in all the ways envisaged – is consistent with that envisaged in the Software Directive. The Court argues that the tenth recital of Directive 91/250 – whether in the English or the French version – does not lend itself to the 'one-way' interpretation advocated by Microsoft. Instead, interoperability implies a 'two-way'

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[32] Ibid., at recitals 688-691.

[33] The *Microsoft* judgment, para. 215.

relationship in that it states that 'the function of a computer program is to communicate and work together with other components of a computer system'.[34]

7. DEFINITION OF THE RELEVANT MARKET AND FINDING OF DOMINANCE

7.1 Definition of relevant markets

The Court upholds the findings of the Commission as to the definition of relevant markets, which are as follows.[35]

The first market defined in the Commission's decision is the market for *client PC operating systems*. As regards the second market, the Commission's decision defines *work group server operating systems* as operating systems designed and marketed to deliver collectively basic infrastructure services to relatively small numbers of client PCs connected to small or medium-sized networks. Both markets are found to have a worldwide dimension.

7.2 Finding of dominance

The Court upholds the finding of dominance in the market for client PC operating systems, which Microsoft itself had acknowledged.[36] It points out the following factors that the Commission relied on to find dominance: Microsoft's market shares are over 90 per cent, Microsoft's market power has enjoyed an enduring stability and continuity and there are significant barriers to entry due to network effects. The Commission found that the dominant position presents extraordinary features in that Windows is not only a dominant product on the market for client PC operating systems but is, in addition, the *de facto* standard for those systems.

The Commission's decision contains an interesting quote concerning the significance of network effects. In his testimony before the US District Court on 18 April 2002, Microsoft's Chairman Bill Gates described this dynamic network effect:

> Early on, [Microsoft] recognized that [, as] more products became available and more information could be exchanged, more consumers would be attracted to the platform, which would in turn attract more investment in product development for the platform. Economists call this a 'network effect', but at the time we called it the 'positive feedback loop'.[37]

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34 Ibid., at paras. 225-226.
35 Ibid., at paras. 23 and 25.
36 See the Commission's decision, recital 429.
37 Ibid., at recital 451.

As to the Commission's finding of dominance in the market for work group server operating systems, the Court points out that

> the Commission takes issue with Microsoft for having used, by leveraging, its quasi-monopoly on the client PC operating systems market to influence the work group server operating systems market… In other words, Microsoft's abusive conduct has its origin in its dominant position on the first product market… Even if the Commission were wrongly to have considered that Microsoft was in a dominant position on the second market … that could not therefore of itself suffice to support a finding that the Commission was wrong to conclude that there had been an abuse of a dominant position by Microsoft.[38]

8. Is Microsoft's interoperability information protected by intellectual property rights?

Microsoft argued that the communication protocols to be supplied are protected by intellectual property rights, namely by patents and by copyright. Moreover, the communication protocols should be protected as valuable trade secrets.[39]

The Commission confirmed, in answer to one of the written questions put by the Court, that its decision did not establish that the interoperability information was not covered by a patent or by copyright or, on the contrary, that it was. The Commission asserted that there was no need to decide that issue since, in any event, 'the conditions for finding an abuse and for imposing the remedy [prescribed by Article 5 of the contested decision] were satisfied whether or not the information is protected by any patent or copyright'.[40]

The Court finds that the legal assessment of the Commission's decision concerning the supply of interoperability information

> must proceed on the presumption that the protocols in question, or the specifications of those protocols, are covered by intellectual property rights or constitute trade secrets and that those secrets must be treated as equivalent to intellectual property rights.
>
> The central issue to be resolved in this part of the plea therefore is whether, as the Commission claims and Microsoft denies, the conditions on which an undertaking in a dominant position may be required to grant a licence covering its intellectual property rights are satisfied in the present case.[41]

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38 The *Microsoft* judgment, para. 559.
39 Ibid., at paras. 270-273.
40 Ibid., at para. 288.
41 Ibid., at paras. 289-290.

9. ARE THE CRITERIA ESTABLISHED IN THE *IMS HEALTH* CASE LAW APPLICABLE TO THE SUPPLY OF INTEROPERABILITY INFORMATION?

Both the Court and the Commission reached the same result, namely that Microsoft has to supply the interoperability information in question. Moreover, both the Court and the Commission share the view that the *Microsoft* case is about the leveraging of a dominant position in one market (client PC operation systems) into an adjacent market (work group server operating systems). However, the overall structure of the Court's and the Commission's legal assessment is, as will be set out in this section, quite different.

The Commission had stated in its decision that

> on a general note, there is no persuasiveness to an approach that would advocate the existence of an exhaustive checklist of exceptional circumstances and would have the Commission disregard *a limine* other circumstances of exceptional character that may deserve to be taken into account when assessing a refusal to supply.[42]

The Commission therefore argued that the supply of interoperability information should not automatically be assessed against the criteria established by the *IMS Health* case law.[43]

The Court reports that, at the hearing, the Commission had confirmed that it had based its decision on the following three exceptional circumstances:

> The first consists in the fact that the information which Microsoft refuses to disclose to its competitors relates to interoperability in the software industry, a matter to which the Community legislature attaches particular importance. The second characteristic lies in the fact that Microsoft uses its extraordinary power on the client PC operating systems market to eliminate competition on the adjacent work group server operating systems market. The third characteristic is that the conduct in question involves disruption of previous levels of supply.[44]

The Court disagrees with the Commission and states the following:

> In the light of the foregoing factors, the Court considers that it is appropriate, first of all, to decide whether the circumstances identified in *Magill* and *IMS Health* … are also present in this case. Only if it finds that one or more of those circumstances are absent will the Court proceed to assess the particular circumstances invoked by the Commission…[45]

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42 The Commission's decision, recital 555.
43 The *Microsoft* judgment, para. 301.
44 Ibid., at para. 317.
45 Ibid., at para. 336.

The final result of the Court's legal assessment is that 'the exceptional circumstances identified by the Court of Justice in *Magill* and *IMS Health*' were also present in the present case.[46] Hence, it is not necessary for the Court to consider the specific exceptional circumstances identified by the Commission.

The Court sets out that the test following from the *Magill* and *IMS Health* case law contains the following four steps:

(i) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;
(ii) the refusal is of such a kind as to exclude any effective competition on that neighbouring market;
(iii) the refusal prevents the appearance of a new product for which there is potential consumer demand; and
(iv) once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 EC unless the refusal is objectively justified.[47]

10. THE COURT'S APPLICATION OF THE FOUR *IMS HEALTH* CONDITIONS FOR ABUSE

The Court's application of the four *Magill/IMS Health* conditions will be briefly set out in the following sections.

10.1 **The indispensable nature of the interoperability information**

It should first be noted that the Court emphasises that the Commission's analysis 'is based on complex economic assessments and that, accordingly, it is subject to only limited review by the Court'.[48]

The Court holds that interoperability has two indissociable components: client-server operability and server/server interoperability.[49] It thus confirms the Commission's two-way approach to interoperability as set out in section 6.4 above.

The Court concludes

> that Microsoft has not established that the Commission made a manifest error when it considered that non-Microsoft work group server operating systems must be capable of interoperating with the Windows domain architecture on an

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46 Ibid., at para. 712.
47 Ibid., at paras. 332 and 333.
48 Ibid., at para. 379.
49 Ibid., at para. 374.

> equal footing with Windows work group server operating systems if they were to be marketed viably on the market.[50]

Moreover, the Court concludes

> that the absence of such interoperability with the Windows domain architecture has the effect of reinforcing Microsoft's competitive position on the work group server operating systems market, particularly because it induces consumers to use its work group server operating system in preference to its competitors', although its competitors' operating systems offer features to which consumers attach great importance.[51]

10.2 **Elimination of competition**

The Court states that, in its decision, the Commission analysed

> together the circumstance that interoperability is indispensable and the fact that the refusal is likely to eliminate competition… Its analysis has four parts. In the first place, the Commission examines the evolution of the work group server operating systems market… In the second place, it establishes that interoperability is a factor which plays a determining role in the use of Windows work group server operating systems… In the third place, it states that there are no substitutes for disclosure by Microsoft of the interoperability information… In the fourth place, it makes a number of observations about the [Communications Protocols Licensing Program].[52]

The Court states that it

> will examine in the following order the four categories of arguments which Microsoft puts forward in support of its contention that the circumstance relating to the elimination of competition is not present in this case: first, the definition of the relevant product market; second, the method used to calculate market shares; third, the applicable criterion; and, fourth, the assessment of the market data and the competitive situation.[53]

The result of the Court's analysis is that 'the circumstance that the refusal at issue entailed the risk of elimination of competition is present in this case'. As mentioned above, the Court upholds the Commission's findings with regard to the

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50 Ibid., at para. 421.
51 Ibid., at para. 422.
52 Ibid., at para. 565.
53 Ibid., at para. 479.

definition of the relevant market and the findings of dominant position. Moreover, the Court upholds the Commission's findings as to the competitive situation.

As to the applicable criterion, it is interesting to note that Microsoft had argued that the Commission's criterion of risk of the elimination of competition is not sufficiently strict since the Commission must demonstrate that the refusal to license an intellectual property right to a third party is 'likely to eliminate all competition' or, in other words, that there is a 'high probability' that the conduct in question will have such a result.

The Court very explicitly dismisses Microsoft's reasoning by stating the following:

> The Court finds that Microsoft's complaint is purely one of terminology and is wholly irrelevant. The expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.[54]

10.3 **The new product**

The Court reaches the conclusion

> that the Commission's finding to the effect that Microsoft's refusal limits technical development to the prejudice of consumers within the meaning of Article 82(b) EC is not manifestly incorrect. The Court therefore finds that the circumstance relating to the appearance of a new product is present in this case.

Some elements of the Court's reasoning should be highlighted. The Court first states that the fact that Microsoft's

> conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in 'limiting production, markets or technical developments to the … prejudice of consumers'.[55]

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[54] Ibid., at para. 561.
[55] Ibid., at para. 55.

According to the Court,

> [t]he circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*, … cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.[56]

The core of the Court's legal reasoning is well summarised in the following two paragraphs:

> [T]he contested decision rests on the concept that, once the obstacle represented for Microsoft's competitors by the insufficient degree of interoperability with the Windows domain architecture has been removed, those competitors will be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, will be distinguished from those systems with respect to parameters which consumers consider important…
>
> Nor would Microsoft's competitors have any interest in merely reproducing Windows work group server operating systems. Once they are able to use the information communicated to them to develop systems that are sufficiently interoperable with the Windows domain architecture, they will have no other choice, if they wish to take advantage of a competitive advantage over Microsoft and maintain a profitable presence on the market, than to differentiate their products from Microsoft's products with respect to certain parameters and certain features. It must be borne in mind that, as the Commission explains at recitals 719 to 721 to the contested decision, the implementation of specifications is a difficult task which requires significant investment in money and time.[57]

10.4 **The absence of objective justification**

10.4.1 *The mere existence of intellectual property rights does not constitute any objective justification*

Microsoft's main argument was that the refusal to supply the interoperability information was objectively justified by the intellectual property rights that it holds over the 'technology' concerned. Microsoft asserted that it had made

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[56] Ibid., at para. 647.
[57] Ibid., at paras. 656, 658.

significant investments in designing its communication protocols and that the commercial success its products have achieved represents the just reward.[58]

In response, the Court first notes

> that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.[59]

The Court states that

> even on the assumption that it is correct, the fact that the communication protocols covered by the contested decision, or the specifications for those protocols, are covered by intellectual property rights cannot constitute objective justification within the meaning of *Magill* and *IMS Health*, paragraph 107 above. Microsoft's argument is inconsistent with the *raison d'être* of the exception which that case law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case law could never apply. In other words, a refusal to license an intellectual property right could never be considered to constitute an infringement of Article 82 EC even though in *Magill* and *IMS Health* … the Court of Justice specifically stated the contrary.[60]

The Court then clarifies that

> the Community judicature considers that the fact that the holder of an intellectual property right can exploit that right solely for his own benefit constitutes the very substance of his exclusive right. Accordingly, a simple refusal, even on the part of an undertaking in a dominant position, to grant a licence to a third party cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only when it is accompanied by exceptional circumstances such as those hitherto envisaged in the case law that such a refusal can be characterised as abusive and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property

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[58] Ibid., at para. 666.
[59] Ibid., at para. 688.
[60] Ibid., at para. 690.

> right by requiring him to grant licences to third parties seeking to enter or remain on that market.[61]

Moreover, the Court finds that 'Microsoft, which bore the initial burden of proof … did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate.'[62]

10.4.2 *The Commission did not introduce a new balancing of incentives test*

The Commission's decision contains the following passage:

> [A] detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft).[63]

Microsoft argued that this passage constituted a new evaluation test, that is, one that was hitherto unknown in the case law.[64] However, the Court finds that Microsoft's submission is based on a misreading of the *Microsoft* decision.[65] In the Court's view, it follows from the context that the Commission in fact did not propose any new balancing test at all.

The Court concludes that the Commission came to a negative conclusion as to the existence of any objective justification

> but not by balancing the negative impact which the imposition of a requirement to supply the information at issue might have on Microsoft's incentives to innovate against the positive impact of that obligation on innovation in the industry as a whole, but after refuting Microsoft's arguments relating to the fear that its products might be cloned … , establishing that the disclosure of interoperability was widespread in the industry concerned … and showing that IBM's commitment to the Commission in 1984 was not substantially different from what Microsoft was ordered to do in the contested decision … and that its approach was consistent with [the Software Directive].[66]

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61 Ibid., at para. 691.

62 Ibid., at para. 697.

63 The Commission's decision, recital 783.

64 The *Microsoft* judgment, para. 704. For an analysis of this test, see Simonetta Vezzoso, 'The Incentives Balance Test in the EU Microsoft Case: A Pro-Innovation Economics-Based Approach?', 27 *ECLR* (2006) p. 382.

65 The *Microsoft* judgment, para. 704.

66 Ibid., at para. 710.

11. ANALYSIS AND CONCLUSIONS

11.1 Major novelty of the judgment: the new product condition *de facto* replaced by a new or improved product test

Both the Court and the Commission left the issue open whether Microsoft's interoperability information was protected by intellectual property rights or not. For the purpose of legal reasoning, both assumed that the information was protected by intellectual property rights. The Court states that this assumption benefits Microsoft because the test whether a dominant firm shall be subject to mandatory licensing is more beneficial to Microsoft than the test whether a dominant firm has to give access to an essential facility not protected by intellectual property rights. The Court explicitly mentions that, according to the *Magill/IMS Health* case law, the difference between the two tests consists in the new product condition that has to be fulfilled only if an essential facility is protected by intellectual property rights.[67]

In order for the new product condition to have any practical significance, it should in my view reasonably be interpreted as representing some additional requirement compared to the 'limiting production, markets or technical development to the prejudice of consumers' stipulated by Article 82(b) of the Treaty.

The Court's reasoning that the new product condition 'falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in "limiting production, markets or technical developments to the … prejudice of consumers"',[68] is therefore not very convincing.

It seems that the competing server operating systems are on the same product market as Microsoft's. At the same time, it is quite clear that the competing server operating systems do offer some at least slightly different features. But are these somewhat different features so significant that the competing group server operating systems reasonably could be characterised as new products? I cannot find any explicit analysis of this issue in the *Microsoft* judgment.

Instead, the Court seems to take some kind of short-cut and simply states that the new product condition is fulfilled because Microsoft's conduct limits technical development. The Court asserts that in doing so it simply applies the earlier *Magill/IMS Health* case law. I am not convinced by the logic of the Court's reasoning in this respect. To me, it would have been more straightforward to explicitly admit that the Court reverses earlier case law by skipping or, at the very least, substantially modifying the new product condition. In fact, after the *Microsoft* judgment, it would be misleading to use the term 'new product condition'. It would be much more appropriate to use the expression 'new *or improved*

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[67] See ibid., at para. 334.
[68] Ibid., at para. 55.

product condition'. In my view, the major novelty of the judgment therefore is that the new product condition from the *Magill/IMS Health* case law has *de facto* been replaced by a new or improved product test.

However, I do agree with the Court's findings, which imply that, from a practical perspective, it would not really matter whether Microsoft's interoperability information is protected by intellectual property rights or not. The new product condition as interpreted by the Court in fact appears to be devoid of any practical significance for the intellectual property right holder in situations where competitors use improved quality as a parameter of competition.[69]

I do think that the Court is right to push back the scope of the privilege accorded to holders of intellectual property rights and bring the antitrust treatment of intellectual property rights more in line with the antitrust treatment applied to property rights concerning physical assets. The following passage from the US *Microsoft* case is quite interesting in this regard.

> Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes… That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability.[70]

In my view, the *Microsoft* judgment thus represents a significant legal novelty, and Microsoft would, in principle, have had good arguments for the Court not to impose any fine at all in view of the novelty of the Court's legal assessment of intellectual property rights under EU antitrust law. This would have been the case if the *Magill/IMS Health* case law was the only thing on which Microsoft could have based its self-assessment of the compatibility of its conduct with Article 82. Relying exclusively on *Magill*,[71] it would have been reasonable for Microsoft to take for granted that, even as a dominant firm, it could continue to compete aggressively and disregard any special responsibility of a dominant firm, on the cumulative conditions that: (i) the refusal to supply information was protected by intellectual property rights; and (ii) the refusal would not prevent the appearance of a new product. Whether technical development would be limited would have

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[69] However, the new product condition may still have some practical significance in cases where competitors want to compete only by selling an identical product at lower prices. On the erosion of the new product condition, see Alexandros Stratakis, 'Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine', 27 *ECLR* (2006) p. 434 at p. 440.

[70] *U.S. v. Microsoft Corp.*, 253 F.3d 34, 63 (Fed. Cir. 2001). As to the conflict between intellectual property rights and competition law, see for example Hans Henrik Lidgard and Jeffery Atik, ed., *The Intersection of IPR and Competition Law – Studies of Recent Developments in European and U.S. Law* (University of Lund 2008).

[71] It should be noted that the judgment in *IMS Health* was rendered some weeks after the Commission's *Microsoft* decision.

been of no legal significance as long as the two conditions mentioned were fulfilled.

However, as I will discuss in the next section, there were other exceptional circumstances present that, taken together, would have made it quite obvious that Microsoft's conduct would be contrary to Article 82.

11.2 The truly exceptional circumstance of the case: the nature of the interoperability information

In the *Magill* case, preventing the appearance of a new product was a really exceptional circumstance that made mandatory licensing an appropriate remedy. In the present *Microsoft* case, I believe that the truly exceptional circumstance lies in the nature of the interoperability information.[72]

Simply speaking, I do not believe that making it more difficult for competing products to interoperate with the products of the dominant firm is a legitimate competitive strategy. Moreover, in the present case, the 1991 Software Directive explicitly stipulates that the authorisation of the holder of a copyright over a computer program may not be required for the decompilation of parts of that program, where this is 'indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs'.[73]

Thus, already in 1991, the EU legislator made clear that even non-dominant firms would not be allowed to rely on intellectual property rights to prevent other firms from obtaining the necessary information for achieving interoperability by reverse-engineering. Against this background, the step is rather small and quite logic to demand from dominant firms not only to be passive but to actively provide interoperability information.

I therefore believe that knowledge of the EU legislator's view on the nature of interoperability information as set out by the Software Directive should have enabled Microsoft to ascertain by way of self-assessment that the firm's conduct would be likely to be seen by the Court as infringing Article 82 EC.

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[72] For a discussion of this aspect, see Erik Sandgren, 'Tvångslicenser – särskild om värdefulla immateriella rättigheter', Master Thesis, University of Stockholm, Prof. Marianne Levin (supervisor) (2006) section 9.1.3. See also the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses of December 2005, which in section 9.2.3 concerning the refusal to supply information needed for interoperability states: 'Even if [information needed for interoperability] may be considered a trade secret it may not be appropriate to apply to such refusals to supply information the same high standards for intervention as those described in the previous subsection [on refusal to license intellectual property rights in general]'.

[73] Art. 6 of the Software Directive.

11.3 The risk of collusion by spill-over effects

Normally, antitrust authorities have good reasons to worry about too much cooperation between competitors, which can easily entail anti-competitive effects.

So what should we think about the following statement concerning cooperation between Microsoft and one of its biggest competitors, Sun?

> 'Over the past year we have worked to establish great communication at all levels between our companies, from regular executive meetings to in-depth working sessions with our engineers,' said [Microsoft CEO Steve] Ballmer. 'In the first year, we've moved from the courtroom to the computer lab. Now we're moving from the lab to the market.'[74]

As I believe that interoperability information is not a legitimate parameter of competition, I do not see any direct competition problems, as opposed to information exchange concerning sensitive competition parameters such as price and production cost.

However, I think that antitrust authorities should be well aware of the risk of harm to competition that arises in circumstances like the present. If competitors meet to discuss detailed interoperability issues, there is obviously a risk that such meetings could have a spill-over effect and entail some kind of cooperation in areas where antitrust authorities would prefer tough competition and no cooperation at all between competitors.

However, I believe that the risks should not be overestimated. The present case could be described as a very special type of standardisation process. It is based on Microsoft supplying information on its *de facto* industry standard interface. There are similar risks inherent in all kinds of standardisation contacts between competitors. Thus, I believe that the risks in question are not of such a magnitude as to question the wisdom of ordering mandatory supply of interoperability information.

11.4 Is the Microsoft judgment an example of a 'more economic approach' to Article 82?

The Commission adopted its *Microsoft* decision in March 2004. The following year, in December 2005, the Commission published its 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses'. The ambition of the Commission is to move to a 'more economic approach' when assessing potential cases of abuse.[75] Against this backdrop, it may be interesting

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[74] Press release published by Microsoft on 13 May 2005, available at: <http://www.microsoft.com/presspass>.

[75] For a critical assessment of a 'more economic approach' under Article 82 EC, see Meinrad Dreher and Michael Adam, 'Abuse of Dominance under Reform – Sound Economics and

to ask to what extent the Commission's *Microsoft* decision can be said to encompass a more economic approach.

I believe that the Commission's decision is a good example of a more economic approach in many aspects. The Commission has undertaken an impressive effort in not only formulating theories of harm but also market testing them. However, it is interesting to note that, in several respects, the Court's judgment can be said to be 'less economic' than the Commission's decision.

One example consists in the Commission assertion that

> on a general note, there is no persuasiveness to an approach that would advocate the existence of an exhaustive checklist of exceptional circumstances and would have the Commission disregard *a limine* other circumstances of exceptional character that may deserve to be taken into account when assessing a refusal to supply.[76]

The Commission thus stresses the need for a more case-by-case approach in which the specific economic circumstances of a specific case are taken into account. However, as set out in section 9 above, the Court chose to follow a more schematic path by applying the conditions set out in earlier case law.[77]

Another example consists in what appeared to be the Commission's balancing of the innovation incentives test as set out in section 10.4 above. In fact, the Court did not evaluate this new test but declared instead that, when seen in its context, the Commission did not mean to establish such a test at all. Obviously, a test involving the balancing of Microsoft's incentives to innovate against the competitors' incentives to innovate would have amounted to a very advanced 'more economic approach'.

A more economic approach is often associated with the competition policy advocated by the influential Chicago School of Antitrust Analysis, as opposed to the traditional ordoliberal approach of EU competition law, which is more or less regarded by many American and European antitrust practitioners as a relic of the past that should be disposed of.[78]

Established Case Law', 28 *ECLR* (2007) p. 278. See also Jürgen Basedow, 'Konsumentenwohlfahrt und Effizienz – Neue Leitbilder der Wettbewerbspolitik?', 57 *Wirtschaft und Wettbewerb* (2007) p. 712. For a more positive view, see for example Christian von Weizsäcker, 'Konsumentenwohlfahrt und Wettbewerbsfreiheit: Über den tieferen Sinn des Economic Approach', 57 *Wirtschaft und Wettbewerb* (2007) p. 1078.

[76] The Commission's decision, recital 555.

[77] As pointed out in section 11.1, I am not very convinced by the Court's treatment of the new product condition. Instead of applying that condition, I believe that the Court in fact set this condition aside or at least significantly modified it.

[78] For a critical assessment of the influence of the ordoliberal approach, see James S. Venit, 'Article 82: The Last Frontier – Fighting Fire with Fire', 28 *Fordham International Law Journal* (2005) p. 1157.

It is therefore interesting to note that the Court's judgment contains several passages upholding the traditional ordoliberal approach to EU competition law. An interesting example is the following passage:

> Last, it must be borne in mind that it is settled case law that Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure (Case 85/76 *Hoffmann-La Roche* v. *Commission* [1979] *ECR* 461, paragraph 125, and *Irish Sugar* v. *Commission*, … paragraph 232). In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.[79]

Moreover, it is interesting to note that the Court refers to the buzz word of ordoliberalism, 'free competition'[80] as the *raison d'être* for competition law to prevail over intellectual property rights.[81]

One of the main differences between the ordoliberal approach and the Chicago School concerns the extent to which less efficient competitors should be protected from the dominant and more efficient firm. According to the Chicago School, less efficient companies should not be protected, whereas according to the ordoliberal approach this may sometimes be necessary in view of protecting the competitive process.[82]

However, as far as I understand the facts of the present case, the Court's judgment was probably motivated both on ordoliberal grounds as well as on 'more economic' grounds as advocated by the Chicago School.[83] The reason for this is that Microsoft's conduct would be likely to eliminate competition not only from less efficient competitors but also from more efficient producers of work group server operating systems. The present case is therefore not only about leveraging market power from one market to another; it is also about competition authorities promoting competition on the merits as opposed to competition based

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[79] The *Microsoft* judgment, para. 664.

[80] This may correspond to the German expression *Wettbewerbsfreiheit*. However, there was no official German language version of the *Microsoft* judgment available when this article was written. The official French language version of the *Microsoft* judgment refers to *libre concurrence*.

[81] The *Microsoft* judgment, para. 690.

[82] On the equally efficient competitor test, see Victoria Mertikopoulou, 'DG Competition's Discussion Paper on the Application of Article 82 EC to Exclusionary Abuses: The Proposed Economic Reform from a Legal Point of View', 28 *ECLR* (2007) p. 241 at pp. 245-246.

[83] For an overview over the different schools of antitrust analysis, see Ingo Schmidt, *Wettbewerbspolitik und Kartellrecht*, 8th edn. (Stuttgart, Lucius & Lucius 2005). For a comparative analysis of EU and US law, see Csongor Istvan Nagy, 'Refusal to Deal and the Doctrine of Essential Facilities in US and EC competition law: A Comparative Perspective and a Proposal for a Workable Analytical Framework', 32 *E.L.Rev.* (2007) p. 664.

on artificial advantages inherent to a dominant position. This aspect is very well summarised in the following passage from the Court's judgment:

> [T]he Commission was correct to consider that the artificial advantage in terms of interoperability that Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features, to the prejudice, notably, of consumers… That refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned, particularly with regard to parameters such as security, reliability, ease of use or operating performance speed…[84]

11.5 Recent and future developments

It is clear that losing the Microsoft case would have dealt a severe blow to the Commission's credibility in enforcing complex cases of abusive conduct. As a result of the Commission's impressive Court victory against Microsoft and several of Europe's most outstanding competition lawyers contracted by Microsoft, the Commission will instead benefit from considerable self-confidence in this area of competition law enforcement. One very interesting area to monitor is the emergence of the Commission's policy as to a new more economic approach to cases of abuse of a dominant position.

An indication of the Commission's growing self-confidence in proactive antitrust enforcement in the computer and software industry is that, on 14 January 2008, the Commission initiated two new formal investigations against Microsoft for suspected abuse of a dominant market position. One of the two cases is in the field of interoperability in relation to a complaint by the European Committee for Interoperable Systems. The second area where proceedings have been opened is in the field of tying in separate software products, following *inter alia* a complaint by Opera, a competing browser vendor.[85]

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[84] The *Microsoft* judgment, para. 653.

[85] Commission press release MEMO/08/19 of 14 January 2008.

APPENDIX B:

SECOND MAIN LICENTIATE ARTICLE

'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective'

in Basedow, Jürgen; Francq, Stéphanie and Idot, Laurence (eds), International Antitrust Litigation – Conflict of Laws and Coordination (Oxford, Hart Publishing, 2012), 289-314 and 433-434

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Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective

ROBERT MOLDÉN*

I. Introduction

A. Introduction to the EU – Framework of Regulation 1/2003

In her book, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law*, Silke Brammer gives the following introduction which is also very well suited to serve as an introduction to the present chapter:

> In 2004, European competition law underwent the most radical reform since its conception. The changes that this reform involved were so significant that it has been described as a 'legal and cultural revolution'. The centerpiece of the reform, commonly referred to as 'modernisation', is Regulation No 1/2003 on the implementation of Articles [101] and [102 TFEU], which entered into force on 1 May 2004. Regulation 1/2003 has brought about a fundamental reorganisation of the division of responsibilities between the European Commission, the national competition authorities (NCAs) and the courts of the Member States of the European Union. It is said to entail a decentralisation of the enforcement of EC competition law.
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> Regulation 1/2003 has in fact established a system of full parallel competences in which the Commission, the NCAs and the courts of the Member States share the responsibility to enforce the EC competition rules. Shared competences and 'decentralised' application of EC competition law through a multitude of enforcers (instead of one central body – the Commission) makes it necessary that the numerous enforcement bodies collaborate and coordinate their action in order to avoid conflicts and to ensure the efficient and consistent application of the law.[1]

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[1] S Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law* (Oxford, Hart Publishing, 2009) 1 (footnotes omitted). An earlier version of the book was accepted as a doctoral dissertation at the KULeuven in April 2008.

Another important development is the Commission's ambition to foster private enforcement of EU competition law which so far, as opposed to the situation in the US, has played a rather modest role in the EU.[2] In its White Paper on Damages actions for breach of the EC antitrust rules the Commission states the following:

> Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, to date in practice victims of EC antitrust infringements only rarely obtain reparation of the harm suffered. The amount of compensation that these victims are forgoing is in the range of several billion euros a year.[3]

By moving from a system of a rather centralised application of EU competition law by a single authority – the Commission – to a system of parallel application of EU competition law by national competition authorities and national courts, the scope for conflicts of laws and jurisdictional issues have significantly increased within the ambit of private enforcement of EU competition law. Most chapters of the present book focus on these issues, which are within the classical domains of private international law.

However, even though national courts and competition authorities are still free, in principle, to apply national procedural law, Regulation 1/2003 imposes strict limitations as to applying national competition law in cases where trade between Member States may be affected. Where national competition authorities and courts apply national competition law to agreements and concerted practices which may affect trade between Member States, they shall also apply Article 101 TFEU. Where the national competition authorities or courts apply national competition law to any abuse prohibited also by Article 102 TFEU, they shall also apply Article 102 TFEU. The application of national competition law may not lead to the prohibition of agreements or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) TFEU, or which fulfil the conditions for exemption under Article 101(3) TFEU.[4]

In order to prevent the decentralisation of the application of EU competition law from leading to a significant loss of coherence in uniform application of substantive EU competition law, Regulation 1/2003 introduced a number of new coordination measures, which are the subject of this chapter.

Since May 2004, the Commission is entitled, acting on its own initiative, to submit written amicus curiae observations on the application of EU competition law to national courts where the coherent application of EU competition law so requires. National competition authorities are entitled to submit such written amicus curiae observations irrespective of whether the coherent application of EU competition law so requires.[5] National courts on their side are entitled to ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competi-

[2] For an overview over recent developments in Swedish competition law as to private enforcement, see HH Lidgard, 'Konkurrensrättsligt skadestånd' (2009) 94 *Svensk Juristtidning* 32. See also H Andersson and E Legnerfält, 'Effective private enforcement: The Swedish experience, a lesson for the EU?' (2009) *Concurrences* 156.

[3] Commission, 'Damages actions for breach of the EC antitrust rules' (White Paper) COM (2008) 165 final, 2 April 2008, 2.

[4] See Art 3 Regulation 1/2003.

[5] Art 15(3) Regulation 1/2003, see III below.

tion rules.[6] In order to enable the Commission to monitor national court proceedings where EU competition law is applied, Member States are obliged to forward to the Commission a copy of any written judgment of national courts applying EU competition law.[7]

These new powers do not affect the pre-existing right of national courts to make references for a preliminary ruling on the interpretation of EU competition law to the Court of Justice under Article 267 TFEU.

This chapter is titled 'Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective'. The chapter will thus present the different coordination measures envisaged in Regulation 1/2003 and Article 267 TFEU to foster the coherent application of EU competition law. The chapter will then try to analyse how well these measures have been working in practice by looking at concrete examples of their application. Moreover, part VII.B contains an overview over the legislative history of the coordination measures now embodied in Article 15 Regulation 1/2003. The ultimate objective of this chapter is to come up with some concrete proposals on how to improve the effectiveness of the system. These proposals – which concern both potential amendments to Regulation 1/2003 as well as potential amendments of national competition law – are summarised in the Policy Proposals.

Ideally, this chapter would look at how the system is applied in all the 27 Member States. However, for practical reasons, I have decided to focus on the one Member State whose legal system I am most familiar with, that is Sweden. This delimitation enables me to make a comprehensive study of all cases where the coordination system embodied in Regulation 1/2003 and Article 267 TFEU has been applied in practice in Sweden, which has been a Member State of the European Union since 1995.

However, before looking at how the coordination system embodied in Regulation 1/2003 and Article 267 TFEU has been applied in Sweden, it will be helpful first to briefly introduce the Swedish system of competition law enforcement, which is the object of the following subsection.

B. Introduction to Swedish Competition Law Procedure – The New Swedish Competition Act of 2008[8]

The new Swedish Competition Act of 2008[9] contains 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,[10] the fact that the substantive provisions of the Swedish Competition Act are in line with those of EU competition law means that the Commission practice and jurisprudence of the Court of Justice can serve as guidance when interpreting the Swedish Competition Act.[11]

[6] Art 15(1) Regulation 1/2003, see IV and V below.

[7] Art 15(2) Regulation 1/2003, see VI below.

[8] The text of this subsection is taken from subsection 1.1 of my Swedish National Report for the LIDC Bordeaux Congress 2010 on 'Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?'.

[9] Swedish Competition Act of 2008, Konkurrenslagen (2008:579).

[10] Swedish Competition Act of 1993, Konkurrenslagen (1993:20).

[11] See Proposition 1992/93:56, 21.

The Swedish Supreme Court has recently, in a case concerning the existence of a dominant position,[12] 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 Swedish competition law is entrusted to the Swedish Competition Authority (SCA)[13] and its approximately 130 employees. There are five operational departments. Competition law departments 1–3 handle competition law cases in the private sector, competition law department 4 handles competition law cases in the public sector. In September 2007, the activities of the former Public Procurement Authority[14] were transferred to a new-founded Department of Public Procurement at the SCA.

In the majority of cases handled by the SCA, the procedure is very similar to that of the Commission's DG Competition and to that of most of other national competition authorities in the EU. The SCA is entitled to take both final and interim injunction decisions on its own,[15] ordering an ongoing 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 SCA is entitled to take decisions making voluntary commitments mandatory, under threat of penalty payments.[17] The Authority is also entitled to issue fine orders.[18] These decisions by the SCA 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 SCA.

However, a peculiarity of Swedish procedural competition law consists in the fact that the SCA may not take any decision on its own to impose fines for breaches of Swedish or EU competition law. Moreover, the SCA is not entitled to take any decisions on its own prohibiting a merger. In these cases, the SCA has to sue the undertakings involved before the District Court of Stockholm. It is thus the District Court of Stockholm which, if the SCA wins its case, imposes fines or prohibits a merger in first instance. Also in these cases, there is only one more instance, as the judgments of the Stockholm District Court can be appealed to the Swedish Market Court, without any appeal to the Swedish Supreme Court being possible.

The current procedural system has recently been criticised by jur dr Eva Edwardsson of Uppsala University, who in a report commissioned by the SCA suggests that the Swedish procedural peculiarities in this respect should be abolished and be brought in line with the EU procedural system; under such a reformed system proposed by Eva Edwardsson, the

[12] Judgment of the Swedish Supreme Court of 19 February 2008 in Case T 2808-05 *Danska staten genom BornholmsTrafikken v Ystad Hamn Logistik Aktiebolag* (*Ystad Harbour*); this case is presented below (IV.B). A similar statement has been made by the Swedish Market Court in its judgment in Case A 4/06, MD 2007:26 of 15 November 2007 *Övertorneå kommun and others v Ekfors Kraft AB and others*, see IV.B below.

[13] Konkurrensverket.

[14] Nämnden för offentlig upphandling (NOU).

[15] c 3 Arts 1 and 3 Swedish Competition Act.

[16] c 3 Art 1 read together with c 6 Art 1 Swedish Competition Act.

[17] c 3 Art 4 read together with c 6 Art 1 Swedish Competition Act.

[18] c 3 Art 17 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 c 7 Art 1 Swedish Competition Act.

SCA would also take decisions on fines and merger prohibitions on its own, these decisions could then be appealed to a number of administrative courts.[20]

When it comes to private enforcement, objections of nullity of anti-competitive agreements can be raised at civil litigation proceedings before one of the 48 Swedish district courts where the defendant is domiciled. Private actions for damages because of infringement of Swedish or EU competition law may also be raised before one of these 48 district courts. Moreover, the Stockholm District Court is always competent to handle such claims.[21] Claims for damages can either be handled in a separate proceeding or jointly processed with an ongoing public enforcement claim for fines before the Stockholm District Court.[22] Judgments of district courts can be appealed to one of the courts of appeal whose judgments in turn can be appealed to the Swedish Supreme Court.

Another peculiarity of Swedish competition procedural law is that private injunction applications to cease any ongoing infringement of Swedish or EU competition law may not be brought directly to court. First, a complaint has to be made to the SCA. If the SCA decides to pick up the case, the Authority would take an injunction decision, which then could be appealed to the Swedish Market Court; in these proceedings, the complainant does not enjoy any standing as a party. If, however, the SCA decides not to pursue the case, the complainant obtains a so-called subsidiary right of action and they can directly lodge its case with the Swedish Market Court which may then, as first and last instance, take an injunction decision.[23]

In summary, in all cases concerning the public enforcement of Swedish and EU competition law, the SCA deals only with two courts: the Stockholm District Court, which has a department specialised in competition law cases; and the Swedish Market Court, which is either the first and only or the second and last instance in these cases.

When it comes to private enforcement of Swedish and EU competition law in Sweden, there is only one court involved in first and last instance, the Swedish Market Court, provided the case concerns a claim for an injunction decision to cease ongoing infringements of competition law. However, claims of nullity or claims for damages can be made not only before the Stockholm District Court, which is the only Swedish district courts employing judges specialised in competition law, but also before the other 47 district courts which mostly lack any expert knowledge in competition law.

II. The Right of National Courts to Request a Preliminary Ruling from the Court of Justice in Competition Law Cases

A. General Observations on Preliminary Rulings by the Court of Justice

As mentioned above, the new coordination measures introduced by Article 15 Regulation 1/2003, which are the main subject of this chapter, do not affect the right and/or duty of

[20] E Edwardsson, *Domstolsprövning av marknadsrelaterad lagstiftning* (report commissioned by the Swedish Competition Authority, 2009, available at www.kkv.se).

[21] c 3 Art 26 Swedish Competition Act.

[22] c 8 Art 7 Swedish Competition Act.

[23] c 3 Art 2 Swedish Competition Act.

national courts under Article 267 TFEU to make a reference for a preliminary ruling on the interpretation of Treaty provisions such as Articles 101 and 102 TFEU. As to preliminary rulings, only the following few remarks will be made.

From the perspective of the national judge a major advantage of preliminary rulings consists in obtaining authoritative – and binding – guidance on how to interpret EU competition law. The major drawback consists in the considerable prolongation of the overall court procedure as it takes considerable time for the Court of Justice to produce a preliminary ruling. This is still the case today, even if the Court of Justice has successfully managed to reduce considerably the average time used for preparing a preliminary ruling to approximately 15–16 months.[24]

B. Swedish Courts' Requests for a Preliminary Ruling from the European Court of Justice in Competition Law Cases

During the first 14 years of Sweden's EU membership, from 1995 to 2009, Swedish courts made references for a preliminary ruling to the Court of Justice in 67 cases, ie on average five cases per year.[25] In the area of public procurement and EU State Aid law not a single reference for a preliminary ruling has been made by a Swedish court so far. In the area of competition law, Swedish courts have made references for a preliminary ruling in two cases, which will be presented below.[26]

i. The STIM *Case*

This was the very first time the Swedish Market Court made a reference for a preliminary ruling to the Court of Justice in a competition law case. The case is an example of private enforcement of EU competition law in Sweden. In October 2004, two commercial broadcasting companies, Kanal 5 and TV 4, brought an application for an injunction before the SCA, on the grounds that STIM abused its dominant position. STIM is a collecting society which enjoys a de facto monopoly in Sweden on the market for making copyright-protected music available for television broadcasting. By decision of 28 April 2005, the SCA dismissed the application on the ground that insufficient grounds existed to justify the opening of an investigation. Kanal 5 and TV 4 then used their subsidiary right of action and brought an action before the Swedish Market Court, which decided to stay the proceedings and to make a reference for a preliminary ruling to the Court of Justice.

In its judgment of 11 December 2008, the Court of Justice, ruled as follows:

> Article 102 TFEU must be interpreted as meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate

[24] See U Bernitz, 'Europarättens genomslag i svensk rätt – var står vi idag?' (2009) *Juridisk Tidskrift* 477, 493.
[25] ibid 492.
[26] See U Bernitz, *Förhandsavgöranden av EU-domstolen – Svenska domstolars hållning och praxis* (report commissioned by SIEPS, 2010).

increase in the costs incurred for the management of contracts and the supervision of the use of those works.

Article 102 TFEU must be interpreted as meaning that, by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified.[27]

It would of course have been very interesting to see how this preliminary ruling is implemented by the Swedish Market Court, in particular as this is the only preliminary ruling in a Swedish competition law case given by the Court of Justice so far. However, this will not be possible. In March 2010, STIM reached out of court settlements with both Kanal 5 and TV 4,[28] which means that the Swedish Market Court no longer has to deliver any judgment in this case.

ii. The TeliaSonera ADSL *Case*

This was the second time a Swedish court made a reference for a preliminary ruling in a competition law case. As opposed to the above-mentioned *STIM* case, this is an example of public enforcement of Swedish and EU competition law. As set out in I.B above, the SCA is not entitled to make any decision on fines on its own, but must sue a defendant before the Stockholm District Court. On 21 December 2004, the SCA sued TeliaSonera before the Stockholm District Court, claiming fines of 144 million SEK for alleged abuse of a dominant position. According to the SCA, TeliaSonera abused its dominant position by applying price squeezes on the ADSL data communications market. On 30 January 2009, ie more than four years after the claim was lodged, the Stockholm District Court made a reference for a preliminary ruling to the Court of Justice, asking in total 10 questions on how to interpret the EU competition law on price squeezes.[29] Oral pleadings took place on 18 March 2010 and the judgment of the Court of Justice is expected to be delivered during autumn 2010.

Hence, no Swedish court has yet had the occasion to implement a preliminary ruling from the Court of Justice in a competition law case. This means that it is not yet possible to evaluate how well preliminary rulings are implemented by Swedish courts in competition law cases.

[27] Case C-52/07 *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa*, judgment of 11 December 2008.

[28] See press release by STIM, 26 March 2010, available at www.stim.se, and press release by TV 4, 19 March 2010, available at www.tv4.se.

[29] The reference for a preliminary ruling of 31 pages was written by judge Ingeborg Simonsson, who holds a PhD in EU competition law. The case number at the Stockholm District Court is T 31862-04.

III. The Right of NCAs and the Commission to Submit Amicus Curiae Observations to National Courts in Competition Law Cases

A. General Points on Amicus Curiae Observations in Competition Law Cases

The right of NCAs and the Commission to submit amicus curiae observations is embodied in Article 15(3) of Regulation 1/2003, which reads as follows:

> Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article [101] or Article [102 TFEU]. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article [101] or Article [102 TFEU] so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.
>
> For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

Article 15(3) Regulation 1/2003 is complemented by provisions in the Commission Notice on the cooperation between the Commission and national courts, which provides the following information as to the procedural framework in which amicus curiae observations are to be submitted by the Commission:

> 34. Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.
>
> 35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles [101] and [102 TFEU]
>
> (a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;
> (b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness); and
> (c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).[30]

By leaving the procedural details of the Commission's intervention to be determined by national rules on civil procedure, Regulation 1/2003 thus opens the way for considerable

[30] Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (Cooperation Notice) [2004] OJ C101/54, paras 34–35 (footnote omitted).

legal uncertainty. As pointed out by Silke Brammer, 'It is therefore unclear whether the Commission, when acting as amicus curiae, must be considered an intervening party *sensu stricto*, an expert witness or a sort of advocate general, or whether it will have a legal status of its own'.[31] The classification of the Commission's assistance may have important procedural consequences.

Between May 2004 and December 2009, the Commission has only submitted amicus curiae observations on three occasions where the Commission considered that there was an imminent threat to the coherent application of the EU competition. None of these three amicus curiae observations were addressed to Swedish courts.[32]

The first two amicus curiae filings, in the *Garage Gremeau* case and the case on tax deductibility of Commission Competition fines in the Netherlands are very well summarised in the Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy of July 2009.[33]

i. The Garage Gremeau *Case*

In 2006, the Commission for the first time made use of Article 15(3) by presenting written observations to the Paris Court of Appeal in the *Garage Gremeau* case concerning the interpretation of the concept of quantitative selective distribution in Regulation 1400/2002 (the 'Motor Vehicle Block Exemption Regulation').[34] The question of whether a car distribution system is selective and if so, whether the selection criteria are quantitative or qualitative in nature, has important legal and practical implications. Subject to compliance with other conditions, distribution agreements of car suppliers with a market share not exceeding 30 per cent benefit from the block exemption under Regulation 1400/2002. This threshold rises to 40 per cent for quantitative selective distribution agreements, while qualitative selective distribution agreements benefit from the block exemption irrespective of the market share of the supplier. Articles 1(1)(f)–(h) of the Motor Vehicle Block Exemption Regulation define selective distribution as being qualitative where the supplier selects distributors according to uniformly applicable and non-discriminatory criteria that are only qualitative in nature, are required by the nature of the goods (for example, to preserve its quality and ensure its proper use) and do not directly limit the number of authorised distributors. By contrast, in a quantitative selective distribution system, the supplier uses selection criteria that directly limit the number of authorised distributors.

The case at issue was brought by Garage Gremeau against DaimlerChrysler France which had terminated all of its existing distribution contracts with a view to restructuring its distribution system on the basis of quantitative selection, in light of Regulation 1400/2002. It refused to conclude a new distribution agreement with its former agreed distributor Garage Gremeau on the basis that it would exceed the number of distributors foreseen as it had appointed another distributor for the area in question. Garage Gremeau requested by way of remedy that it should be admitted to DaimlerChrysler's network. This was refused

[31] Brammer, *Co-operation between National Competition Agencies* (n 1) 46.

[32] See Commission, 'Report on the functioning of Regulation 1/2003' (Commission Report) (Communication) COM (2009) 206 final, 29 April 2009, para 35.

[33] Commission, 'Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003' (Staff Working Paper) SEC (2009) 574 final paras 284–90.

[34] Commission Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicles sector [2002] OJ L203/30.

at first instance and on appeal. The Cour de Cassation subsequently affirmed the appeal court's finding that DaimlerChrysler's criterion of nominating a certain number of authorised distributors for different sales territories was objective and precise, but held that the lower court should have examined both the objectivity of its other selection criteria and how these were implemented, in particular because the new authorised distributor in Burgundy did not fulfil these at the time of its appointment. These judgments generated considerable interest in the sector, including in other Member States.

The Commission intervened to clarify that quantitative selective distribution systems do not have to fulfil the same requirements as those applicable for qualitative selective distribution systems, meaning that it is not necessary to assess the objectivity of the selection criteria other than those for determining the number of distributors. If that were the case, the categories of quantitative and qualitative selective distribution would be conflated, contrary to Regulation 1400/2002. With regard to any assessment of the implementation of the selection criteria, the Commission observed that there does not appear to be any basis in Regulation 1400/2002 for preventing a supplier from foreseeing a transitional period for fulfilling its requirements if it considers that a given candidate has the financial and technical potential. Otherwise, this would tend to limit access to existing authorised distributors who have already made the necessary investments, foreclosing more competitive newcomers. This case is currently subject to a stay of proceedings. Stakeholders have noted that the Commission's intervention was very useful in that it could be invoked in similar proceedings before other national courts.

ii. The Case on Tax Deductibility of Commission Fines in the Netherlands

The Commission also decided to make observations pursuant to Article 15(3) Regulation 1/2003 in a case in the Netherlands concerning the tax deductibility of Commission competition fines. In the initial judgment of 22 May 2006 on this issue, the Dutch Rechtbank van Haarlem (Court of First Instance in Haarlem, notably in tax matters) ruled that fines imposed by the Commission for infringement of the EC competition rules are partially deductible from income tax. The court found that although Dutch law provides that administrative fines cannot be deducted from income tax, fines imposed by the Commission cannot be understood according to the national definition of 'fine' as, unlike fines imposed under Dutch law, they consist of punitive elements and elements intended to skim off illegal gains.

This judgment was appealed to the Gerechtshof te Amsterdam (Belastingkamer) (Court of Appeal of Amsterdam, tax chamber). The Commission moved to intervene as amicus curiae to highlight that Community fines for breach of the EU competition rules are not intended to skim off illegal gains and that the principle of equivalence would be breached if fines imposed under EU competition law could be deducted in contrast to fines under national law. Moreover, it would go against the principle of effectiveness, as the impact of Commission decisions would necessarily be reduced if companies fined for the violation of Articles 101 and 102 TFEU could (at least partially) deduct the amount from national income tax.

In an intermediary judgment of 12 September 2007, the Gerechtshof te Amsterdam decided to ask for a preliminary ruling to the European Court of Justice under Article 267 TFEU regarding the possibility for the Commission to intervene on the basis of Article 15(3) in such national (tax) litigation.

On 11 June 2009, the Court of Justice ruled that Article 15(3) Regulation 1/2003

> must be interpreted as meaning that it permits the Commission of the European Communities to submit on its own initiative written observations to a national court of a Member State in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof imposed by the Commission for infringement of Articles [101] or [102 TFEU].[35]

Following this judgment of the Court of Justice, the Commission submitted its amicus curiae observations before the Gerechtshof te Amsterdam. In its judgment of 11 March 2010, the Gerechtshof te Amsterdam set aside the judgment of the Rechtbank van Haarlem. It held that fines imposed by the Commission are not deductible from taxes and thus followed the line suggested by the Commission in its amicus curiae observations.[36]

iii. The Pierre Fabre Dermo-Cosmétique *Case*

In 2009, the Commission submitted written amicus curiae observations in the *Pierre Fabre Dermo-Cosmétique* case before the Paris Court of Appeal.[37] The Commission's observations relate to a restriction of online sales in selective distribution. They are summarised in the Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy 2009 of June 2010, paragraph 509, as follows:

> The Commission observed that a general prohibition of on-line sales imposed by the supplier on its selected distributors is an infringement by object under Article [101](1) [TFEU], which is not block-exempted under Regulation 2790/1999. Moreover, the Commission observed that the notion of 'objective justification', mentioned in point 51 of the Guidelines on Vertical Restraints, should be interpreted strictly and shall not replace the analysis of efficiencies under Article [101](3) [TFEU]. In general, only exceptional circumstances, external to the parties, may be considered as an objective justification for restrictions by object. If however the supplier proves that the conditions of Article [101](3) [TFEU] are fulfilled, the agreement may be individually exempted under that Article. On 29 October [2009], the Paris Court of Appeal referred to the ECJ a question for preliminary ruling under Article [267 TFEU].[38]

In its Report on the functioning of Regulation 1/2003 from April 2009, the Commission states that stakeholders have called on the Commission to have greater recourse to the instrument of amicus curiae observations and that the Commission intends to reflect upon how this practice should further develop.[39] In my view, there are probably good reasons for the Commission to use the instrument of amicus curiae observations more frequently, merely three amicus curiae observations in five and a half years is indeed a quite low figure.

[35] Case C-429/07 *Inspecteur van de Belastingdienst v X BV*, judgment of 11 June 2009.

[36] See European Commission, 'Observations as Amicus Curiae – New Developments' *ECN Brief 2/2010* available at www.ec.europa.eu/competition/ecn/index_en.html.

[37] Paris Court of Appeal, Case No RG 2008/23812 *Pierre Fabre Dermo-Cosmétique*.

[38] Case C-439/09 *Pierre Fabre Dermo-Cosmétique*. The referred question is whether a general and absolute prohibition to sell contract goods to end users via the Internet, imposed on authorised distributors within the framework of a selective distribution network, constitutes an infringement of Art 101(1) TFEU, which is not exempted under Regulation 2790/1999, however could possibly benefit from an individual exemption under Art 101(3) TFEU.

[39] Para 35 Commission Report.

It is therefore interesting to note that the Commission, in the first half of 2010, has announced that it intends to submit amicus curiae observations in two new cases, before the Irish High Court[40] and before the Supreme Court of the Slovak Republic.[41]

However, in view of the limited practical experience gained so far as to national courts' implementation of amicus curiae observations by the Commission, it is still difficult to make any empirically based proposal as to whether it would be necessary to amend Article 15 Regulation 1/2003 in order to obtain a higher degree of legal certainty by specifying what formal role and standing the Commission should have in national proceedings.

B. Amicus Curiae Observations Issued by the SCA to Swedish Courts in Competition Law Cases

i. The Soda-Club *Case*

On 25 March 2010, the SCA sent written amicus curiae observations to the Svea Court of Appeal in Stockholm in the *Soda-Club* case.[42] This is the first time that the SCA made use of its right under Article 15(3) Regulation 1/2003 to submit amicus curiae observations in competition law cases handled by Swedish courts.

The background is as follows. Soda-Club and Vikingsoda are competing companies active, inter alia, in the business of refilling cartridges used for the production of soda water with carbon dioxide. Vikingsoda does not only refill its own cartridges but also cartridges of Soda-Club. In doing so, Vikingsoda adds its trademark Vikingsoda to the Soda-Club cartridges which bear the trademark SODA-CLUB. On 5 February 2010, the Stockholm District Court took an interim injunction decision prohibiting Vikingsoda, inter alia, from adding its trademark on cartridges bearing the SODA-CLUB trademark, as this would constitute an infringement of Soda-Club's rights to its trademark.

Vikingsoda appealed the interim injunction decision to the Svea Court of Appeal which granted leave to appeal.

In its amicus curiae observations to the Svea Court of Appeal, the SCA points out that its preliminary investigations indicate that Soda-Club's exercise of its intellectual property rights may constitute an abuse of a dominant position. The Soda-Club case is still pending.

[40] See European Commission, 'Observations as Amicus Curiae – New Developments' *ECN Brief 2/2010*. The case concerns a certain rationalisation scheme in the Irish beef industry organised by the Beef Industry Development Society (BIDS). Upon a preliminary ruling by the Court of Justice of 20 November 2008 in Case C-209/07, the Irish Supreme Court found in a judgment of 3 November 2009 that the scheme infringed Art 101(1) TFEU and remitted the case back to the High Court to decide on whether the conditions of Art 101(3) are satisfied; it is in this remitted case that the Commission has decided to submit amicus curiae observations.

[41] See press release of the Antimonopoly office of the Slovak Republic of 4 May 2010, available at www.antimon.gov.sk/135/3892/the-european-commission-intends-to-express-its-standpoint-in-the-mater-of-abuse-of-dominant-position.axd as well as the press release of 7 December 2007, available at www.antimon.gov.sk/427/2868/the-antimonopoly-office-of-sr-will-submit-an-appeal-against-judgement-of-the-county-court-in-bratislava.axd. The case concerns the appropriate level of fines to be imposed on a rail-cargo firm found of having abused a dominant position. In a judgment of 6 December 2007, the County Court in Bratislava, while upholding the Antimonopoly office's finding of abuse of a dominant position, had reduced the amount of the fines imposed by 88%. The Antimonopoly Office considered that the imposition of such a low sanction – 9 million SKK – instead of 75 million SKK, for a serious breach of competition rules meant that the sanction would not have sufficient preventive effects. It therefore appealed to the Supreme Court of the Slovak Republic, which on 4 May 2010 decided to suspend the case until the Commission submits its amicus curiae observations.

[42] The case number at the Svea Court of Appeal is Ö 1561-10, the case number at the Swedish Competition Authority is 632/2009.

IV. The Right of National Courts to Request Opinions from the Commission in Competition Law Cases

A. General Points on Requests of Opinions from the Commission by National Courts in Competition Law Cases

The right of national courts to request opinions[43] from the Commission is embodied in Article 15(1) Regulation 1/2003, which reads as follows:

> In proceedings for the application of Article [101] or Article [102 TFEU], courts of the Member States may ask the Commission to transmit to them information in its possession or its *opinion* on questions concerning the application of the Community competition rules (emphasis added).

Article 15(1) Regulation 1/2003 is supplemented by the Cooperation Notice, which provides the following information:

> In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information. In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.
>
> When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.[44]

Between May 2004 and 31 March 2009, the Commission issued opinions on 18 occasions on requests from national courts on questions concerning the application of what are now Articles 101 and 102 TFEU.[45] Nine of these eighteen opinions were issued to courts in Spain, five to courts in Belgium, two to courts in Sweden and one each to courts in Lithuania and the Netherlands.[46]

The Commission opinions are summarised in the Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy of July 2009 as follows:

> 278. The opinions issued to Spanish courts all concerned litigation between service station operators and wholesale suppliers of petroleum products. In most cases, the service station operators were seeking a declaration of nullity of the contract they have concluded with the wholesaler on the grounds that it infringed EC competition law.

[43] The right of national courts to request information from the Commission is also embodied in Art 15(1) Regulation 1/2003. However, for practical reasons, the right to request information will be dealt with in a separate part, see V below.

[44] Paras 28–29 Cooperation Notice.

[45] Para 277 Staff Working Paper.

[46] Some of the opinions are published on the Commission's website www.ec.europa.eu/competition/court/antitrust_requests.html.

279. The other opinions issued by the Commission relate to a wide variety of matters. The Commission has given opinions to Belgian courts on: exclusive purchasing agreements for beer and non-beer beverages; the application of Articles [101] and [102 TFEU] to exhibitions; the application of Article [102 TFEU] to favourable conditions and rebates granted by collecting societies; the conformity of the general conditions in a pilotage contract, including an exoneration of responsibility and an indemnity clause, with Article [102 TFEU]; and the applicability of Articles [101] and [102 TFEU] to the exclusion of one of the members of a standards setting organization . . .

281. In an opinion given to a Dutch national court, the Commission provided guidance on whether quota allocations for mussel seeds in The Netherlands which set by an association of mussel farmers for its members, fell to be assessed under Articles [101] and [102 TFEU] or whether it came within the scope of Regulation 26/62 on the application of competition rules to agricultural products. Finally, the Commission provided an opinion to a Lithuanian court on whether it was compatible with Article [106](1) [TFEU], in conjunction with Article [102 TFEU], for a municipality to carry out a tender procedure for the award of an exclusive right to collect waste for 15 years.

282. Some stakeholders have highlighted what they perceive as reluctance on the part of some national judges to seek opinions from the Commission under Article 15(1). To try to address this issue, the Commission has published examples of opinions given to national courts on the Directorate General for Competition's website so that national courts can get an idea of what an opinion can provide.([325]) Guidance is also given on the Directorate General for Competition's website detailing what requests for opinions should contain.[47]

([325]) This is only done once the judgment in the court case concerned has been rendered and is subject to conformity with national procedural, at www.ec.europa.eu/competition/court/requests.html.

B. Requests for Opinions from the Commission by Swedish Courts in Competition Law Cases

So far, only two requests for an opinion have been made by Swedish courts in competition law cases, one by the Swedish Supreme Court and one by the Swedish Market Court. These requests and corresponding opinions will briefly be presented below.

i. The Ystad Harbour *Case*

On 18 October 2006, the Swedish Supreme Court made a request for an opinion under Article 15(1) Regulation 1/2003 for the very first time. In the private enforcement case at question, Bornholms Trafikken, which is owned by the Kingdom of Denmark and operates ferryboat traffic between Ystad and the Danish island of Bornholm, had claimed that the harbour of Ystad abused its dominant position by charging excessive prices to Bornholms Trafikken.

In its request for an opinion, the Swedish Supreme Court asked the Commission for its opinion on 'whether the provisions of port services in the port of Ystad to ferry operators offering ferry services for passengers and vehicles on the route Ystad-Rönne should be regarded as the relevant market for the application of Article 102 TFEU'.

[47] Paras 278–82 Staff Working Paper.

In an opinion of eight pages, dated 16 February 2007, the Commission provided the Swedish Supreme Court with – in my view – a very useful overview over the method used by the Commission to define the relevant market.[48] The issue of whether the harbour of Ystad had a dominant position was outside the scope of the opinion.

On 19 February 2008, the Swedish Supreme Court found in an interim judgment that the harbour of Ystad has a dominant position in the provision of harbour services. In its judgment, the Swedish Supreme Court explicitly refers to the opinion of the Commission, stating the following:

> In its opinion, the Commission sets out the method and the process the Commission applies when defining the relevant market. The method, which is based on established EU case-law, should be applied in the present case (author's translation).[49]

Hence, the *Ystad Harbour* case is in my view a very good example of how the coordination measures embodied in Article 15(1) Regulation 1/2003 can work well in practice.

ii. The Ekfors *Case*

On 18 January 2007 the European Commission for the first time received a request for opinion under Article 15(1) Regulation 1/2003 from the Swedish Market Court. In its opinion of approximately 10 pages, the Commission sets out under which conditions municipalities providing street lighting can be considered an 'undertaking' under Articles 101 and 102 TFEU.

The background to this private enforcement case is as follows. The municipalities of Övertorneå and Haparanda claimed that Ekfors, a provider of electricity supply services, had abused its dominant position when it cut off electricity services in order to compel the municipalities to accept excessive price increases. As a result, street lighting ceased to function in substantial areas of the two municipalities. In order to have a subsidiary right of action under Swedish law to bring its case to the Swedish Market Court, the municipalities had to qualify as undertakings in the sense designated by Articles 101 and 102 TFEU.[50]

In its judgment of 15 November 2007,[51] the Swedish Market Court found that the municipalities of Övertorneå and Haparanda qualified as undertakings in the sense designated by Articles 101 and 102 TFEU.[52] While the judgment mentions that the Swedish

[48] For this reason it is unfortunate that the opinion of the Commission has not yet been published on the Commission's website. In the letter accompanying its opinion, the Commission informed the Swedish Supreme Court that the Commission intended to publish the opinion. Therefore, the authentic Swedish language opinion was complemented by an English translation of the opinion. In its letter, the Commission also informed the Swedish Supreme Court that if it had any objections against such a publication, the Swedish Supreme Court should indicate this at the latest 'when a copy of the judgment is forwarded to the Commission in accordance with Article 15(2) of Regulation 1/2003'. However, it appears that the judgment, more than two years after its delivery, still has not been forwarded to the Commission, which means that the Commission has not yet been able to publish either the judgment or the opinion on its website. It may therefore be expedient to note that the judgment of the Swedish Supreme Court can be downloaded from its website www.hogstadomstolen.se. Both the Swedish as well as the English version of the Commission's opinion can be obtained free of charge by sending an e-mail to the Registry of the Swedish Supreme Court, the address is hogsta.domstolen@dom.se.

[49] Judgment of the Swedish Supreme Court of 19 February 2008 in *Ystad Harbour* (n 12) 10. The case is still pending as to whether the harbour of Ystad abused its dominant position.

[50] The municipalities brought their case to the Swedish Market Court after the Swedish Competition Authority had decided not to intervene against Ekfors.

[51] Judgment of the Swedish Market Court of 15 November 2007 in Case A 4/06, MD 2007:26 (the *Ekfors* case).

[52] As to the merits of the case, the Swedish Market Court found that no abuse of a dominant position could have occurred as the decision of Ekfors to cut off electricity supply did not entail that 'the conditions for competition had been impaired', see judgment p 25, last paragraph.

Market Court requested an opinion from the Commission under Article 15(1) Regulation 1/2003 as to interpretation of the notion of undertaking under EU competition law,[53] the judgment does not explicitly mention to what extent the Swedish Market Court has followed the Commission's opinion. However, in my view, it can be said that the judgment of the Swedish Market Court is well in line with the Commission's opinion in this respect.[54]

C. The Right of Swedish Courts to Request Opinions from the Swedish Competition Authority in Competition Law Cases

Article 15(1) Regulation 1/2003 entitles national courts to request opinions from the Commission. However, national courts do not derive any right to request opinions from their national competition authorities from Regulation 1/2003; such a right can only be derived from national procedural law.

Swedish courts regularly *ex officio* request opinions from the SCA in the area of public procurement law. Between September 2007, when the SCA became the competent authority in this area, and May 2010, Swedish courts requested opinions on the interpretation of Swedish and EU public procurement law in no less than 12 cases.[55] The legal basis for this is the provision in Article 24 Swedish Act on Administrative Procedure,[56] according to which an administrative court may request an opinion from a government authority holding expert knowledge in a given area of law.

The right of Swedish civil courts to request expert opinions from government authorities – such as the SCA – is embodied in Chapter 40, Article 1 Swedish Code of Judicial Procedure.[57] In public enforcement cases, civil courts may make such a request for an opinion *ex officio*.[58] However, in civil litigation cases, civil courts may no longer make such a request *ex officio* but only on request by one of the parties.[59]

Before Regulation 1/2003 entered into force in May 2004, Swedish courts made several requests for opinions from the SCA in cases concerning the private enforcement of competition law.[60] The last time a Swedish court requested an opinion from the SCA was in June 2002, in what is probably the biggest private enforcement case ever in Sweden, the *SAS v Luftfartsverket* case.

[53] Judgment p 2.

[54] Unfortunately, it appears that a copy of the judgment of the Swedish Market Court almost three years after its delivery has not yet been forwarded to the Commission as the judgment is not yet published on the Commission's website. However, both the judgment and the Commission's opinion (in Swedish language) can be downloaded from the website of the Swedish Market Court, www.marknadsdomstolen.se.

[55] One request from the Supreme Administrative Court, six requests from the Administrative Court of Appeal in Stockholm, three requests from the Administrative Court of Appeal in Jönköping, one each from the Administrative Courts in Stockholm and Jönköping, respectively. The opinions can be downloaded from www.kkv.se.

[56] Förvaltningsprocesslagen (1971:291).

[57] Rättegångsbalken.

[58] This follows from c 8 Art 2 Swedish Competition Act (Konkurrenslagen) read together with c 40 Art 1 and c 35 Art 6 Swedish Code of Judicial Procedure (Rättegångsbalken).

[59] The right of civil courts to *ex officio* request opinions (and other forms of evidence) in disputes where out-of-court settlements are permitted was repealed by the Act amending the Swedish Code of Judicial Procedure, published in September 2005 (Lag 2005:683 om ändring i rättegångsbalken).

[60] See, eg, the opinion of the Swedish Competition Authority of 5 December 1995, Dnr 626/95, requested by the Solna District Court in Case T 1532/93, *Nya färghuset i Ystad AB v D-Fastigheter AB*. The legal dispute concerned the question whether a non-compete clause was contrary to the Swedish Competition Act and as such subject to nullity. The Swedish Competition Authority's opinion of five pages concerned the definition of the relevant market.

i. The SAS v Luftfartsverket *Case*

On 27 April 2001, the Göta Court of Appeal ruled that Luftfartsverket, the Swedish authority in charge of civil aviation, had abused its dominant position by discriminating against SAS which had to pay higher fees than its competitors for using a specific terminal at the Stockholm Arlanda airport.[61] The case did not involve any damages. However, the Göta Court of Appeal found that the abuse by Luftfartsverket entailed nullity, which meant that as a result of the judgment SAS was reimbursed for payments of fees and was liberated from future fees to an overall amount of more than €100 million.

The judgment was appealed to the Swedish Supreme Court, which on 10 June 2002 decided to request an opinion from the SCA before taking a decision on whether to grant leave of appeal. After the SCA submitted its opinion on 3 October 2002,[62] the Swedish Supreme Court decided on 12 November 2002 not to grant leave of appeal.[63]

It is striking that no Swedish court has made any request for an opinion on the interpretation of competition law from the SCA since June 2002. One reason may be that there seems to be a widespread general understanding that Swedish courts, after Regulation 1/2003 came into force, may no longer ask the SCA for any opinions on questions concerning the application of EU competition law. The reason for this – in my view erroneous – conclusion may lie in an *e contrario* interpretation of Article 15(1) Regulation 1/2003, according to which 'courts of the Member States may ask *the Commission* to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules' (emphasis added).

However, according to Article 15(4) Regulation 1/2003, 'This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State'.

An *e contrario* interpretation of Article 15(1) Regulation 1/2003 would lead to the conclusion that Regulation 1/2003 as of May 2004 precludes national courts from requesting opinions on the interpretation of EU competition law. In my view, such an *e contrario* interpretation is not appropriate. Instead, Regulation 1/2003 should correctly be understood not to constitute any legal obstacle for Swedish courts' right under Swedish law to request an opinion from the SCA on the interpretation of Swedish or EU competition law.

The most straightforward way to remove this uncertainty would be to amend Article 15(1) Regulation 1/2003, giving national courts the explicit power based on EU law to request opinions from NCAs on the interpretation of EU competition law. As NCAs already have the power under Article 15(3) to submit amicus curiae observations to national courts it may make sense to give national courts the corresponding right to request opinions from NCAs.

In this respect it is interesting to note that the two Swedish requests for an opinion from the Commission under Article 15(1) Regulation 1/2003 have been made by the Swedish

[61] Judgment of the Göta Court of Appeal in Case T 33-00 *Staten genom Luftfartsverket v Scandinavian Airlines System.*

[62] Case 544/2002 at the Swedish Competition Authority. The opinion consists of 10 pages.

[63] Decision of the Swedish Supreme Court in Case T 2137-01. It is interesting to note that Luftfartsverket thereafter claimed that the Swedish Supreme Court by refusing to grant leave and to make a reference for a preliminary ruling from the Court of Justice in a situation where it was obliged to do so, had infringed EU law. Luftfartsverket therefore requested that proceeding in the case should be re-opened. In its decision of 9 December 2004 (Ö 1891-03), the Swedish Supreme Court ruled that it had not infringed EU law as there had been no obligation on the Swedish Supreme Court to make a reference for a preliminary ruling in this case. Luftfartsverket was represented by then advokat Stefan Lindskog who later was appointed as a judge to the Swedish Supreme Court.

Supreme Court and by the Swedish Market Court.[64] None of the 48 Swedish district courts where private enforcement cases can be brought has so far made any request for an opinion from the Commission. Private enforcement of EU competition law before these courts may, for example, consist in one party to a contract claiming nullity under Article 101(2) TFEU. For a district court judge lacking any prior experience in applying EU competition law it could constitute less of a psychological barrier to request guidance from the SCA as compared to the European Commission in Brussels. This is one of the reasons why I think that empowering national courts to request opinions from their NCA may be a useful tool in improving the effectiveness and feasibility of private enforcement of competition law. This issue will be explored more in detail in part VII, which is titled: 'Why national courts are not entitled by Regulation 1/2003 to request information and opinions from NCAs – Proposal to consider amending Regulation 1/2003 in this respect'. This section includes an overview over the legislative history of the coordination measures now embodied in Article 15 Regulation 1/2003.

V. The Right of National Courts to Request Information from the Commission in Competition Law Cases

The right of national courts to request information[65] from the Commission is embodied in Article 15(1) Regulation 1/2003, which reads as follows:

> In proceedings for the application of Article [101] or Article [102 TFEU], courts of the Member States may ask the Commission to transmit to them *information* in its possession or its opinion on questions concerning the application of the Community competition rules (emphasis added).

As follows from the provisions in the Commission Notice on the cooperation between the Commission and national courts,[66] the information to be provided by the Commission to national courts under Article 15(1) Regulation 1/2003 can be divided into two sub-groups of information.

The first sub-group concerns 'information of a procedural nature to enable it to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position'. The communication of such information of a procedural nature to national courts should, in the words of Valentine Korah, 'not give rise to much trouble'[67] and will therefore not be further analysed in this chapter.

The second sub-group of information consists of documents which the Commission has in its possession. As indicated in the cited provisions of the Notice above the communication of such documents from the Commission to the national courts raises serious prob-

[64] By the Swedish Supreme Court in the *Ystad Harbour* case, by the Swedish Market Court in the *Ekfors* case, see IV.B above.

[65] The right of national courts to request opinions from the Commission is also embodied in Art 15(1) Regulation 1/2003. However, for practical reasons, the right to request opinions is dealt with in a separate section, see IV.A above.

[66] Paras 21–26 Cooperation Notice. According to the Notice, the Commission will endeavour to provide the national court with the requested information within one month from the date it receives the request.

[67] Valentine Korah, *An Introductory Guide to EC Competition Law and Practice*, 9th edn (Oxford, Hart Publishing, 2007) 257.

lems as to the protection of professional secrecy. According to the Notice, the Commission may only transmit documents covered by professional secrecy to a national court if it can and will guarantee protection of confidential information and business secrets. To my knowledge, no Swedish court has so far made any request under Article 15(1) Regulation 1/2003 to get access to documents held by the Commission. Requests under Article 15(1) of the said Regulation have been confined to opinions from the Commission, see IV.B above.

Access to the Commission's – and NCAs' – file and evidence is obviously of significant practical importance for private enforcement of EU competition law, in particular for follow-on actions. Access to the Commission's and NCAs' files entail significant legal issues related to diverging national rules on the protection of professional secrecy and is covered in the contribution to this volume by Professor Laurence Idot on this subject.

VI. The Obligation of Member States to Forward National Judgments on EU Competition Law to the European Commission

A. General Points

The obligation of Member States to forward national judgments on EU competition law to the Commission is embodied in Article 15(2) Regulation 1/2003, which reads as follows:

> Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article [101] or Article [102 TFEU]. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

Article 15(2) is supplemented by the Cooperation Notice, whose relevant provision reads as follows:

> According to Article 15(2) of the regulation, Member States shall send to the Commission a copy of any written judgment of national courts applying Articles [101] or [102 TFEU] without delay after the full written judgment is notified to the parties. The transmission of national judgments on the application of Articles [101] or [102 TFEU] and the resulting information on proceedings before national courts primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgment.[68]

The Staff Working Paper Accompanying the Report from the Commission on Competition Policy of July 2009 contains the following comments on Article 15(2) Regulation 1/2003:

> Article 15(2) of Regulation 1/2003 requires Member States to forward to the Commission a copy of any written judgment of national courts deciding on the application of Articles [101] or [102 TFEU]. These judgments must be sent 'without delay after the full written judgment is notified to the parties'. The Commission publishes a database of the judgments it receives from the Member States pursuant to Article 15(2). This database, although welcomed as potentially being a valuable source of case practice, is criticised by several stakeholders on the grounds that it is far from complete. Some stakeholders have provided suggestions for improving the functioning of

[68] Para 37 Cooperation Notice.

> Article 15(2). For example, it has been proposed that the national competition authorities should be given the duty of assembling the relevant judgments in their respective territories and transmitting them to the Commission, as is currently done in several Member States. It is further proposed that this could be combined with a procedural duty on litigants to serve their initial pleadings on the Commission and/or national competition authority concerned, so that the latter could be alerted to the litigation at an early stage. Overall, options for ensuring a more efficient and effective way of providing access to national court judgments should be contemplated.[69]

The incompleteness of reported national judgments in EU competition law cases as highlighted in the Commission Staff Working Paper of April 2009 still persists more than one year later. For example, until 22 May 2010 the number of national court judgments published on the Commission's website[70] was the following for a sample of EU Member States: France: 40 judgments, Germany: 35 judgments, United Kingdom: 3 judgments, Italy: 1 judgment, Denmark: 1 judgment, Poland: 0 judgments. As for Sweden, there are 3 reported national judgments, 2 from the Swedish Market Court[71] and 1 from the Swedish Supreme Court.[72]

B. The Swedish Example: Non-Transparent Provisions

In the first introductory chapter of the Swedish Competition Act, Article 3 contains the following general reference to the provisions of Regulation 1/2003:

> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU and Council Regulation (EC) No 13972004 of 20 January 2004 on the control of concentrations between undertakings contain provisions that are relevant to the implementation of this Act.

Moreover, in Chapter 8 Swedish Competition Act which deals with Court procedures, Article 13 contains the following specific reference to Article 15 Regulation 1/2003:

> A statement which has been submitted by the Commission of the European Community or the Swedish Competition Authority, thereby applying Article 15 of Council Regulation (EC) No 1/2003, may be taken into account by the court without the plea of a party. The parties shall be provided the opportunity to comment on the statement.

In my view, there is a lack of transparency and user-friendliness in the Swedish Competition Act as to the provisions of Regulation 1/2003. Even though it is true that Regulation 1/2003 is directly applicable and – from a formal point of view – no implementation into Swedish law is necessary, I think that it would make sense to replicate the provisions of Article 15 Regulation 1/2003 into the Swedish Act in a more explicit way. In particular, it is unfortunate that the Swedish Competition Act does not contain any explicit reference to the duty contained in Article 15(2) to forward copies of judgments on EU competition law to the Commission. The general reference to Regulation 1/2003 in Chapter 1, Article 3 SCA is too general. Therefore, the provision of Article 15(2) on the duty of the Member State Sweden to forward copies of Swedish courts judgments needs to be specified into Swedish law in order to work better in practice.

[69] Para 291 Staff Working Paper (footnotes omitted).

[70] www.ec.europa.eu/competition/elojade/antitrust/nationalcourts.

[71] Judgment of the Swedish Market Court in Case A 3/04, MD 2005:5 *VVS-Installatörerna v Konkurrensverket* of 9 February 2005; judgment of the Swedish Market Court in Case A 7/04, MD 2005:29 *B2 Bredband Holding AB (publ) v Telia Sonera Aktiebolag (publ) and TeliaSonera Sverige Aktiebolag* of 1 November 2005.

[72] Judgment of the Swedish Supreme Court in Case T 2280-02 *BMA v FV* of 23 December 2004.

If the Swedish legislator does not specify in the Swedish Competition Act which authority or court is responsible for forwarding the Swedish judgments, there is a significant risk that no one assumes this responsibility. Moreover, there is a transparency problem, as a national judge is more familiar with applying provisions embodied in national laws as opposed to provisions only embodied in EU regulations without being explicitly replicated in national laws, such as the Swedish Competition Act or the Swedish Code of Judicial Procedure.[73]

The example of the German Competition Act below illustrates my points and can serve as a model for amendments to the Swedish Competition Act as well as competition acts in other Member States which lack the corresponding level of transparency and user-friendliness.

C. The German Example: Transparent Provisions

In Germany, cooperation between German courts and the Commission is governed by Article 90a German Act against Restraints of Competition (ARC),[74] which reads as follows:

> Cooperation of the Courts with the Commission of the European Community and the Cartel Authorities
>
> (1) In all judicial proceedings where Article [101] or [102 TFEU] are applied the court shall, without undue delay after serving the decision on the parties, forward a duplicate of any decision to the Commission of the European Community via the Bundeskartellamt. The Bundeskartellamt may transmit to the Commission of the European Community the documents which it has obtained pursuant to § 90(1) sentence 2.
>
> (2) In proceedings pursuant to paragraph 1 the Commission of the European Community may, acting on its own initiative, transmit written observations to the court. In case of a request pursuant to Art. 15(3) sentence 5 of Council Regulation (EC) No 1/2003 the court shall provide the Commission of the European Community with all documents necessary for the assessment of the case, including copies of all briefs and duplicates of all records, orders and decisions. § 4b (5) and (6) of the Federal Data Protection Act [*Bundesdatenschutzgesetz*] shall apply *mutatis mutandis*. The court shall provide the Bundeskartellamt and the parties with a copy of the written observations of the Commission of the European Community made pursuant to Art. 15(3) sentence 3 of Council

[73] It should be pointed out that there is indeed a provision in Art 6 Swedish Competition Regulation of 2008 (Konkurrensförordning 2008:604) which reads as follows: 'When a civil court or the Swedish Market Court gives a judgment or takes a final decision concerning the application of Articles 101 or 102 TFEU, a copy of the judgment or decision should be sent to the Swedish Competition Authority on the same day' (author's translation). The Swedish Competition Regulation of 2008 only contains seven paragraphs and does – with the exception of said Art 6 – not contain any provisions of significant practical importance for the application of EU competition law by Swedish courts. Its provisions are therefore likely to be overlooked by Swedish courts when applying EU competition law. Moreover, while the Competition Regulation of 2008 obliges Swedish courts to send copies of judgments applying Arts 101 and 102 TFEU to the Swedish Competition Authority, there is no explicit obligation on the Swedish Competition Authority to actually forward these judgments to the European Commission. The Swedish National Courts Administration publishes on its website (www.dvhandbok.domstol.se) a number of practical handbooks widely used at Swedish courts. In the Handbook on Delivery of Judgments and Decisions in Civil Courts of Appeal – *Domstolsverkets handbook expediering hovrätt* – there is a clear and explicit statement under Section B 81.4 that if a civil court of appeal delivers a judgment or decision applying Arts 101 or 102 TFEU, the court shall on the same day send a copy to the Swedish Competition Authority. However, in the corresponding Handbook on Delivery of Judgments and Decisions in civil courts of first instance – *Domstolsverkets handbook expediering tingsrätt tvistemål* – there is no such statement of the court's duty to send a copy to the Swedish Competition Authority when applying Arts 101 or 102 TFEU. The handbook only states, under Section 60.1, that if a court delivers a judgment concerning damages under the Swedish Competition Act, a copy of the judgment should be sent to the Swedish Competition Authority.

[74] Gesetz gegen Wettbewerbsbeschränkungen (GWB), downloaded from the Bundeskartellamt's homepage, www.bundeskartellamt.de.

> Regulation (EC) No 1/2003. The Commission of the European Community may also submit oral observations in the hearing.
>
> (3) In proceedings pursuant to paragraph 1 the court may ask the Commission of the European Community to transmit information in its possession or for its observations on questions concerning the application of Article [101] or Article [102 TFEU]. The court shall inform the parties about a request made pursuant to sentence 1, and shall provide them as well as the Bundeskartellamt with a copy of the reply of the Commission of the European Community.
>
> (4) In the cases of paragraphs 2 and 3 the contacts between the court and the Commission of the European Community may also occur via the Bundeskartellamt.

Article 90a ARC thus replicates the provisions of Article 15 as to the possibility of the Commission to submit amicus curiae observations (paragraph 2) as well as German courts' right to request information and opinions from the Commission (paragraph 3). In particular, the German provisions are explicit on how this Member State's duty to forward copies of judgments from German courts to the Commission shall be handled in practice. According to Article 90a(1) ARC the German court in question is obliged to forward a copy of its judgment to the Bundeskartellamt, which then forwards it to the Commission.

In my view, the provisions of Article 90a ARC may serve as an example of high transparency and user-friendliness concerning the rights and duties of national courts stemming from Article 15 Regulation 1/2003. In particular, I propose that similar provisions should be inserted in the Swedish Competition Act to increase transparency and make clear which authority is responsible for ensuring that copies of judgments by Swedish courts on EU competition law are forwarded to the Commission. Moreover, I propose that corresponding amendments should be made in competition law acts of other Member States which lack the transparency and user-friendliness of the German ARC.

VII. Why National Courts Are Not Entitled by Regulation 1/2003 to Request Information and Opinions from NCAs – Proposal to Consider Amending Regulation 1/2003 in this Respect

A. A Puzzling Asymmetry between Articles 15(1) and 15(3)

As mentioned in the introduction to this chapter one of the main ideas behind the modernisation of EU competition law procedure was to achieve decentralised application of EU competition law by national courts and national competition authorities.

The provisions of Article 15(3) Regulation 1/2003 entitling both NCAs as well as the Commission to submit amicus curiae observations on issues relating to EU competition law fit nicely into the decentralisation agenda. Moreover, it can be assumed from the wording of the provision that amicus curiae observations in the majority of cases will be submitted by NCAs as opposed to the Commission.[75]

[75] Art 15(3) Regulation 1/2003 first mentions the NCAs and only then the Commission. Moreover, the Commission is only entitled to submit amicus curiae observations on the condition that the coherent application

Against this background, it is somewhat puzzling that the corresponding right of NCAs to request information or opinions only apply in relation to the Commission as the centralised European competition authority. In a truly decentralised system it would be natural to expect that national courts also would be entitled to request information or opinions from their NCA.

In order to analyse the reasons for this asymmetry, it is necessary to present an overview of the history of the legislative process leading to the enactment of Regulation 1/2003, which is done in the following subsection.

B. An Overview of the Legislative History of the Coordination Measures Embodied in Article 15 Regulation 1/2003

The legislative process leading to the enactment of Regulation 1/2003 in December 2002 was launched by the Commission's White Paper[76] in April 1999. Upon a consultation process, the Commission published a Proposal for a new Regulation 1/2003 in September 2000.[77]

All three coordination measures later to be embodied in Article 15 Regulation 1/2003 and being the subject of this chapter were already presented in the White Paper.[78] As will be set out below, two of the coordination measures were substantially altered during the legislative process (the duty to forward copies of judgments and the right to submit amicus curiae observations). In contrast, the third coordination measure (the right of national courts to request information or opinions) remained unchanged through the entire legislative process.

i. The Obligation to Forward Copies of National Judgments on EU Competition Law to the Commission – Article 15(2)

According to the White Paper it is first of all vital that the Commission should be aware of proceedings in which Articles 101 and 102 TFEU are invoked before the courts, so that the Commission is made aware of any problems of textual interpretation or lacunae in the legislative framework. The White Paper therefore proposed that the new regulation should require courts to supply such information, ie not only copies of judgments rendered but information on all new court proceedings once Article 101 or 102 TFEU are invoked.

The Commission's proposal for a new Regulation 1/2003 of September 2000 considerably narrowed down the duties of national courts in this respect. Instead of informing the Commission of all new court proceedings where Articles 101 or 102 TFEU are invoked, national courts were only to forward judgments applying these Articles to the Commission, within one month. The final version of Regulation 1/2003 further narrowed down the duties of national courts, as only *written* judgments were to be forwarded to the Commission. On the other hand, the time frame was tightened, from one month following

of EU competition law so requires, whereas there is no such limitation on the NCA's right to submit amicus curiae observations.

[76] Commission, 'White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty' (White Paper) COM (1999) 101 final, 28 April 1999.

[77] Commission, 'Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87' COM (2000) 582 final, 27 September 2000.

[78] White Paper (n 76) para 107.

the delivery of the judgment to 'without delay after the full written judgment is notified to the parties'.

ii. The Right of NCAs and the Commission to Submit Amicus Curiae Observations to National Courts – Article 15(3)

The original White Paper proposed that the Commission should be allowed, subject to the leave of the court, to intervene in judicial proceedings that come to its attention as a result of national courts informing the Commission of new court proceedings where Articles 101 or 102 TFEU are invoked.

The Commission's proposal for a new Regulation 1/2003 in September 2000 also contained several amendments compared to the original proposals of the White Paper. Firstly, the Commission's right to submit written or oral amicus curiae observations would no longer be subject to any leave of the court. Secondly, a possibility for NCAs to submit amicus curiae observations was introduced, either as a representative of the Commission or on their own initiative. Thirdly, the Commission's right of submitting amicus curiae observations was made dependent on 'reasons of the Community public interest'.

Again, the final version of Regulation 1/2003 enacted in December 2002 contained a number of significant changes as compared to the Commission's Proposal of September 2000. Firstly, the right of NCAs to submit amicus curiae observations was highlighted by a change of order, mentioning the NCAs' right first and only then the Commission's right to submit amicus curiae observations. Simultaneously, the possibility for the Commission to have itself represented by NCAs was suppressed. Secondly, the right of NCAs and the Commission to submit oral amicus curiae observations was made dependent on the permission of the national court, as opposed to written amicus curiae observations where such permission is not required. Thirdly, the condition for the Commission to be entitled to submit amicus curiae observations was changed from 'reasons of the Community public interest' to 'where the coherent application of Article 101 or 102 TFEU so requires'.

iii. The Right of National Courts to Request Information and Opinions from the Commission – Article 15(1)

The original White Paper proposed that the new Regulation 1/2003 should incorporate the rules then set out in the 1993 Notice,[79] which provided that in the course of proceedings before them national courts may address themselves to the Commission to ask for information of a procedural, legal or economic nature.[80]

The Commission's Proposal for a new Regulation 1/2003 of September 2000 contained the very provision envisaged in the original White Paper, namely that 'In proceedings for the application of Article 101 or 102 TFEU, courts of the Member States may ask the Commission for information in its possession or for its opinion on questions concerning the application of the Community competition rules'.

In its Explanatory Memorandum accompanying the Proposal, the Commission explained that the proposed Regulation codifies the existing obligation of the Commission

[79] Commission Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty [1993] OJ C39/6 paras 37–40.

[80] The 1993 Notice in this respect followed the judgment of the ECJ in Case C-234/89 *Delimitis v Henninger Brau AG* [1991] ECR I-935 para 53, according to which national courts, based on the Commission's obligation of loyal cooperation, are entitled to obtain factual or legal information from the Commission.

to cooperate with national courts. The Explanatory Memorandum does not present any reasons for not entitling national courts also to request information or opinions from NCAs.

The final version of Article 15(1) Regulation 1/2003 is in principle identical to the text of the Commission's Proposal, ie Regulation 1/2003 only entitles national courts to request information or opinions from the Commission and not from NCAs. Recital 21 explains why Regulation 1/2003 should entitle national courts to be able to ask the Commission for information or for its opinion on points concerning the application of EU competition law. However, it is silent on the question why the right of national courts to obtain information or opinions should not be applicable in relation to NCAs.

C. Analysis of the Legislative Process

It follows from the overview of the legislative process that, at the outset, ie in the original White Paper of April 1999, there was symmetry between the Commission's right to submit amicus curiae observations and the national courts' right to request, inter alia, opinions from the Commission. NCAs were entirely kept outside the coordination mechanism.

This symmetry was already lost during the first year and a half of the legislative process, as the Commission's Proposal of September 2000 introduced a possibility also for NCAs to submit amicus curiae observations to national courts, without any corresponding right conferred on national courts to request opinions from NCAs. However, at this stage, the wording of the Proposal suggests that amicus curiae observations would mostly be submitted by the Commission, while amicus curiae observations submitted by NCAs on their own initiative would be less frequent.

It was only at the final stage of the legislative procedure, in Regulation 1/2003, that the order was reversed and that amicus curiae filings by NCAs were first mentioned. At that stage, the provisions became clearly asymmetric. The novel and far-reaching right of NCAs to submit amicus curiae observations is not matched by any corresponding right of national courts to request opinions from their NCA. As set out in the beginning of this section, this is somewhat puzzling as such a right would fit in well in the overall agenda of increased decentralisation.

As set out above, two of the coordination measures were substantially altered during the legislative process (the duty to forward copies of judgments and the right to submit amicus curiae observations). Both of these coordination measures were new and led to considerable public debate as well as intervention by Member States in the legislative process.

However, in contrast, the third coordination measure (the right of national courts to request information or opinions from the Commission) remained unchanged throughout the entire legislative process. One possible explanation for this is that this measure was considered to be rather uncontroversial as it only entailed codifying existing case-law. The publicly available documents relating to the legislative process mentioned above do not contain any reasoning as to why national courts' right to request information and opinions should not also apply in relation to NCAs.

In an article on the White Paper on Modernisation published in 2000,[81] Katherine Holmes argued that the Commission should consider to encourage national courts to seek

[81] K Holmes, 'The EC White Paper on Modernisation' (2000) 23 (4) *World Competition* 51, 78.

the views of NCAs in court proceedings. However, it appears that the pros and cons of giving national courts a right under Article 15(1) to request information and opinions also from NCAs were not really debated during the legislative process behind Regulation 1/2003.

In my view, there are good reasons for the Commission to now consider amending Article 15(1) Regulation 1/2003 in this respect, giving national courts the right to request information and opinions also from NCAs. Such an amendment may lead to a more efficient coordination scheme. In particular, I think that this right may be particularly useful in private enforcement cases before courts lacking such expert knowledge of EU competition law, which is held by judges active at the specialised courts of public enforcement. The subsequent intrusion into the procedural autonomy of the Member States may well be a price worth paying. Moreover, the degree of additional intrusion into the procedural autonomy of Member States is rather limited as compared to the quite far-reaching intrusion into the procedural autonomy of Member States already caused by the introduction of the right of the NCAs and the Commission to submit amicus curiae observations on their own initiative to national courts.

B

Exchange of Information and Opinions between European Competition Authorities and Courts – From a Swedish Perspective

ROBERT MOLDÉN

The modernisation of the application of EU competition law in May 2004 entailed a far-reaching decentralisation, empowering national courts and NCAs to apply EU competition law fully.

The only way for a national court to obtain binding guidance on the interpretation of EU competition law is to make a reference for a preliminary ruling to the Court of Justice. However, this procedure entails a delay of 15–16 months which is the average time for the Court of Justice to process a reference. During the first 14 years of Sweden's EU membership, from 1995 to 2009, Swedish courts made references for a preliminary ruling in 67 cases; only two of these references concern the interpretation of EU competition law.

In order to prevent the decentralisation of the application of EU competition law from leading to a significant loss of coherence in the uniform application of substantive EU competition law, Regulation 1/2003 introduced a number of new coordination measures, which are the subject of my contribution.

Between May 2004 and April 2009, the Commission received 18 requests for an opinion on the application of EU competition law, of which two requests from Swedish courts. In the same period, the Commission submitted written amicus curiae observations on the application of EU competition law to national courts on two occasions. Since then, the Commission has decided to submit amicus curiae observations on three more occasions. The Swedish Competition Authority submitted its first ever amicus curiae observations in the *Soda Club* case on 25 March 2010.

I share the view expressed in the Commission's Report on the functioning of Regulation 1/2003 from April 2009 that there are probably good reasons for the Commission to have greater recourse to the instrument of amicus curiae observations.

Before the entry into force of Regulation 1/2003, Swedish courts regularly requested opinions on the interpretation of Swedish and EU competition law from the Swedish Competition Authority. While Swedish courts still regularly request opinions from the Swedish Competition Authority on the interpretation of Swedish and EU public procurement law, no Swedish court has requested any opinion on the interpretation of EU competition law since the entry into force of Regulation 1/2003.

One possible explanation for the absence of any requests of opinions from the Swedish Competition Authority may be an *e contrario* interpretation of Article 15(1) Regulation 1/2003, which would lead to the conclusion that Regulation 1/2003 as of May 2004 precludes national courts from requesting opinions on the interpretation of EU competition law from a NCA as no such right is foreseen by Article 15(1) Regulation 1/2003. In my view, such an *e contrario* interpretation of Regulation 1/2003 is not appropriate. Instead, Regulation 1/2003 should correctly be understood not to constitute any legal obstacle for Swedish courts' right under Swedish procedural law to request an opinion from the Swedish Competition Authority on the interpretation of Swedish or EU competition law.

It appears that the pros and cons of giving national courts a right under Article 15(1) to request information and opinions also from NCAs – as opposed to only from the Commission – were not really debated during the legislative process behind Regulation 1/2003.

In my view, there are good reasons for the Commission now to consider amending Article 15(1) Regulation 1/2003 in this respect, giving national courts the right to request information and opinions also from NCAs. Such an amendment may lead to a more efficient coordination scheme. I think that this right may be particularly useful in private enforcement cases before courts lacking such expert knowledge of EU competition law which is held by judges active at the specialised courts of public enforcement. The subsequent intrusion into the procedural autonomy of the Member States may well be a price worth paying. Moreover, the degree of additional intrusion into the procedural autonomy of Member States is rather limited as compared to the quite far-reaching intrusion into the procedural autonomy of Member States already caused by the introduction of the right of the NCAs and the Commission to submit amicus curiae observations on their own initiative to national courts.

In order to enable the Commission to monitor national court proceedings where EU competition law is applied, its Member States are obliged to forward to the Commission a copy of any written judgment of national courts applying EU competition law. However, it appears that a significant number of such judgments are not reported to the Commission.

One possible explanation for the poor performance of Member States in reporting judgments in which EU competition law is applied to the Commission may be a lack of transparency in national competition law acts on which court or authority shall be responsible for the forwarding of judgments to the Commission. In this respect, it is interesting to look at the provisions of Article 90a(1) German Act against Restraints of Competition. The provisions in question state explicitly that it is the duty of the German court giving the judgment to forward a copy to the Bundeskartellamt, which then forwards it to the Commission.

In my view, the provisions of Article 90a German Act against Restraints of Competition may serve as an example of high transparency and user-friendliness concerning the rights and duties of national courts stemming from Article 15 Regulation 1/2003. In particular, I propose that similar provisions should be inserted in the Swedish Competition Act to increase transparency and make clear which authority is responsible for ensuring that copies of judgments by Swedish courts on EU competition law are forwarded to the Commission. Moreover, I propose that corresponding amendments should be made in competition law acts of other Member States which lack the transparency and user-friendliness of the German Act against Restraints of Competition.

APPENDIX C:

THIRD MAIN LICENTIATE ARTICLE

'Public Procurement and Competition Law
from a Swedish Perspective
– Some Proposals for Better Interaction'

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

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C

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.
>
> 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

[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

[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

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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

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[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

[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.

[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.

APPENDIX D:

FIRST DEBATE LICENTIATE ARTICLE

'This is how the Swedish Public Procurement Act should be modified in order to promote fair competition'

(2014) 1 *Upphandling 24 p 7*

(translated from the original Swedish language version titled

'Så bör LOU ändras för att främja sund konkurrens')

LOU borde ändras på flera punkter för att bättre främja sund konkurrens, skriver Robert Moldén, EU-advokat och partner på Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet.

"Så bör LOU ändras för att främja sund konkurrens"

» **LÅNGA OCH MYCKET** omfattande ramavtal kan ha en konkurrensbegränsande effekt, särskilt vad gäller små och medelstora företags möjligheter att delta i upphandlingar.

Därför har EU-lagstiftaren i artikel 32 i det klassiska direktivet ställt upp ett krav på att "ramavtal får inte löpa längre än fyra år, utom i vederbörligen styrkta undantagsfall". Dessutom gäller att "upphandlande myndighet får inte använda ramavtal på otillbörligt sätt eller på ett sådant sätt att konkurrensen förhindras, begränsas eller snedvrids".

» **VAR ÅTERFINNS DÅ** dessa direktivbestämmelser i LOU? Vad gäller det första kravet på att ramavtal i regel inte bör löpa längre än fyra år är direktivbestämmelsen fullgott implementerad och återfinns i kapitel 5, paragraf 3 i LOU. Vad gäller den andra bestämmelsen om att ramavtal inte får användas på ett sådant sätt att konkurrensen begränsas, till exempel genom mycket omfattande ramavtal, så letar man däremot förgäves i LOU.

Bakgrunden till att direktivets krav på att konkurrensen ska värnas vid ramavtal saknas i LOU är ett utlåtande från Lagrådet som fann att detta krav redan följde av de upphandlingsrättsliga principerna, såsom likabehandlings- och proportionalitetsprincipen och att det därför var obehövligt att ta in denna bestämmelse i LOU.

Jag har analyserat svensk och EU-rättspraxis i denna del och funnit att Lagrådet faktiskt hade fel.

» **DET FÖLJER INTE** alls av likabehandlings- eller proportionalitetsprincipen att en upphandlande myndighet i samband med upphandling av ramavtal skulle ha någon skyldighet att värna konkurrensen på marknaden.

Det är intressant att notera att Konkurrensverket i ett aktuellt yttrande rörande SKL Kommentus Inköpscentrals upphandling av kopieringsmaskiner gjort samma bedömning, nämligen att konkurrensskyldigheten enligt artikel 32 i det klassiska direktivet inte har implementerats och därför borde ges direkt effekt av svenska domstolar.

» **JAG ANSER DÄRFÖR** att det är angeläget att den svenska lagstiftaren tar tillfället i akt att rätta till Lagrådets felbedömning i denna del i samband med att det nya klassiska upphandlingsdirektivet implementeras i svensk rätt.

Det skulle göra LOU mer konkurrensfrämjande och säkerställa att LOU inte längre bryter mot EU-rätten i detta hänseende.

Den föreslagna lagändringen är dessutom mycket enkel att genomföra. Det enda som krävs är att i LOUs kapitel om ramavtal lägga till följande direktivbestämmelse:

"En upphandlande myndighet får inte använda ramavtal på otillbörligt sätt eller på ett sådant sätt att konkurrensen förhindras, begränsas eller snedvrids".

Enkelt. Det är en mycket enkel lagändring som krävs, skriver Robert Moldén. Ändringen skulle göra LOU mer konkurrensfrämjande.

Robert Moldén
EU-advokat och partner på Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet

Robert Moldén har analyserat svensk och EU-rättspraxis i en artikel i Europarättslig Tidskrift. För den som vill veta mer finns hela artikeln att läsa på korta.nu/9xuq8.

The public procurement act should be modified in some points in order to promote fair competition, writes Robert Moldén, EU-advokat and partner at Gärde Wesslau as well as doctoral candidate in the field of competition- and public procurement law at Lund's University.

"This is how the Swedish Public Procurement Act should be modified in order to promote fair competition"

Long and very wide framework agreements can have a competition restricting effect, especially when it comes to the chances of small and middle-sized companies to participate in procurements.

Hence, the EU-legislator imposed a requirement in Article 32 of the classic directive so that "the term of a framework agreement may not exceed four years, save in exceptional cases duly justified". Moreover, "contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition".

Where do we find these directive provisions in the Swedish Public Procurement Act? As regards to the first requirement, that the term of a framework agreement may not exceed four years, the directive provision is completely implemented and can be found in § 3, Chapter 5 of the Swedish Public Procurement Act. With regard to the second provision, that a framework agreement should not be used in such a way as to restrict competition, for example through very wide framework agreements, one looks in vain into the Swedish Public Procurement Act.

The background to why the directives requirement, that the competition should be protected from framework agreements, is missing in the Swedish Public Procurement Act, is a legal opinion issued by the Swedish Council on Legislation, which found that this requirement already follows from the public procurement principles, such as the principles of equal treatment and proportionality and that it would therefore be unnecessary to implement those provision in the Swedish Public Procurement Act. I have analyzed the Swedish and EU-case law in this part and have found that the Swedish Council on Legislation is wrong.

It doesn't follow at all from the principles of equal treatment or proportionality that a contracting authority in connection to procurement of framework agreements should have the obligation to preserve competition on the market.

It is interesting to note that the Swedish Competition Authority made the same assessment in a current statement concerning SKL Kommentus Inköpscentral's procurement for copiers, namely that the competition obligation according to article 32(1) of the classic directive has not been implemented and should therefore be given direct effect by the Swedish courts.

Hence, I think that it is important that the Swedish legislator takes the initiative to correct the Council on Legislation's misjudgment on this part and at the same time implements the new classic procurement directive into Swedish law.

That gives the Swedish Public Procurement Act a more competition friendly approach and ensure that the Swedish Public Procurement Act does not contravene EU law any longer in this regard. The proposed modification of the law is therefore easy to conduct. It just requires that the following directive provision is added into the Public Procurement Act's chapter about framework agreements: "A contracting authority may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition."

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APPENDIX E:

SECOND DEBATE LICENTIATE ARTICLE

'The new classic EU Directive increases competition requirements'

(2014) 2 *Upphandling 24 p* 8

(translated from the original Swedish language version titled 'Nytt klassiskt EU-direktiv ökar konkurrenskravet')

LOU borde ändras på flera punkter för att bättre främja sund konkurrens, skriver Robert Moldén, EU-advokat och delägare i Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet. I förra numret presenterade han förslag på hur LOU borde ändras, här föreslår han ytterligare ändringar.

"Nytt klassiskt EU-direktiv ökar konkurrenskravet"

» **OMFATTANDE RAMAVTAL KAN** ha en konkurrensbegränsande effekt, särskilt vad gäller små och medelstora företags möjligheter att delta i upphandlingar.

Det är intressant att notera att det nya klassiska direktivet som nyligen antogs av EU-parlamentet väsentligen utökar konkurrenskravet. Med det nya direktivet kommer detta krav inte bara att gälla vid upphandling av ramavtal utan vid upphandling av alla kontrakt. Enligt artikel 18 i det nya direktivet gäller nämligen följande: "Upphandlingen får inte utformas i syfte att [...] på ett konstgjort sätt begränsa konkurrensen".

Europas ledande expert på relationen mellan konkurrens- och upphandlingsrätt, Albert Sánchez Graells, anser att det nya upphandlingsdirektivet därmed befäster en nyutvecklad princip inom upphandlingsrätten: konkurrensprincipen.

» **JAG ANSER ATT** mycket talar för att han har rätt, läs gärna hans artikel "Principle of competition finally consolidated into public procurement directives" på bloggen How to Crack a Nut (korta.nu/u85of)

Jag anser därför att den svenska lagstiftaren bör överväga att lägga till konkurrensprincipen i LOU på samma sätt som tidigare gjorts i Tyskland, där konkurrensprincipen – "Wettbewerbsprinzip" – redan är upptagen bland de upphandlingsrättsliga principerna i den tyska upphandlingslagen.

För att LOU ska kunna främja sund konkurrens är det viktigt att trösklarna för att leverantörer genom överprövning ska kunna agera mot konkurrenssnedvridande upphandlingar inte är för höga.

» **HÖGSTA FÖRVALTNINGSDOMSTOLEN AVKUNNADE** den 1 juli 2013 förra året en mycket viktig dom i detta hänseende (HFD 2013 ref 53). Domen gäller skaderekvisitet vid överprövning av offentlig upphandling. Eftersom klaganden inte klargjort på vilket sätt valet av förfarande hade medfört skada eller risk för skada ansåg HFD att det saknades skäl att pröva huruvida den upphandlade myndigheten hade haft rätt att välja ett förhandlat förfarande. Tidigare har det i sådana fall – för att uppfylla skaderekvisitet – ofta ansetts tillräckligt att visa att det inte går att utesluta att klagandens anbud skulle kunna ha varit annorlunda utformat om bristerna inte funnits.

» **DET HAR VISAT** sig att ett betydande antal förvaltningsrätter och kammarrätter under den senaste tiden har åberopat HFD-domen för att kräva att klaganden, för att uppfylla skaderekvisitet, ska kunna bevisa att denne skulle ha lämnat det vinnande anbudet om de påstådda bristerna inte funnits. I många fall då de påtalade bristerna bygger på att förfrågningsunderlaget har varit otydligt, eller att det förekommit otillåtna ändringar, så är detta krav i praktiken omöjligt att uppfylla då ingen med säkerhet kan veta hur ett anbud skulle ha utformats i den hypotetiska situationen att de påtalade bristerna inte hade förelegat.

Gör som Tyskland. Den svenska lagstiftaren bör överväga att lägga till konkurrensprincipen i LOU på samma sätt som tidigare gjorts i Tyskland, skriver Robert Moldén.

» **DESSA MYCKET HÖGT** ställda beviskrav riskerar att strida mot EU-rättens effektivitetsprincip samt kraven i det klassiska direktivet på att den leverantör som riskerar skada ska ha rätt till en effektiv överprövning. Dessutom riskerar de höga beviskraven att snedvrida konkurrensen och motverka just sund konkurrens.

Robert Moldén
EU-advokat och delägare i Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet

Robert Moldén har analyserat svensk och EU-rättspraxis i en artikel i Europarättslig Tidskrift. För den som vill veta mer finns hela artikeln att läsa på korta.nu/9xuq8.

The Swedish Public Procurement Act should be modified in some points in order to promote fair competition, writes Robert Moldén, EU-advokat and partner at Gärde Wesslau as well as doctoral candidate in the field of competition and public procurement law at Lund's University. In a previous edition he presented a proposal as to how the Swedish Public Procurement Act should be modified, in the following article he will propose further modifications.

"The new classic EU Directive increases competition requirements"

Wide framework agreements can have a competition restricting effect, especially when it comes to the chances of small and middle-sized companies to participate in procurements.

It is interesting to note that the new classic Directive, which was recently adopted by the EU Parliament, substantially increases the competition requirements. According to the new directive the requirement will not only apply for the procurement of framework agreements, but for procurements of all contracts. According to Article 18 of the new Directive the following applies: "Procurement may not be designed with the intention [...] of artificially narrowing competition".

Europe's leading expert on the relation between competition- and public procurement law, Albert Sanchez Graells, thinks that the new procurement directive confirms a newly developed principle within public procurement law: The principle of competition.

In my opinion, there are many indications that he is right, which you can read in his article "Principle of competition finally consolidated into public procurement directive" on the blog How to Crack a Nut (korta.nu/u85of).

I think that the Swedish legislator should consider implementing the competition principal in the Swedish Public Procurement Act as Germany did before, where the principle of competition – "Wettbewerbsprinzip" – is already implemented in the public procurement principles of the German Public Procurement Act.

In order to give the Swedish Public Procurement Act the chance to promote fair competition, is it important that the threshold is not too high, so that contractors have the possibility to act against competition distorting procurement through review.

The Swedish Supreme Administrative Court (HFD) gave an important judgment on this matter on 1 July 2013 (HFD 2013 ref 53). The judgment concerns damage requirements in connection to the review of public procurement. Because the claimant did not clarify in what way the choice of a proceeding had led to damage or risk of damage, there was a reason missing, according to the HFD, to examine whether the contracting authority had the right to choose a negotiated procedure. Previously they held in such a case – in order to fulfill the damage requirements - that it is sufficient to show that it cannot be excluded, that the claimant's tender could have been different, if the shortcoming would not have been there.

It has been shown that a significant number of administrative courts have followed the HFD lately in order to request that the claimant, in order to fulfill the damage requirements, should be able to prove that he would have left the winning tender, if the alleged shortcoming did not exist. In many cases, where the lodged shortcomings are based on the fact that the tender document was unclear, or that unlawful modifications occurred, this obligation is in practice impossible to fulfill, since no one can know for sure how a

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tender would have been framed in the hypothetical situation that the lodged shortcomings did not exist.

The very high burden of proof risks infringing the EU principle of effectiveness as well as the obligation in the classic directive that the contractor, which is risking damage, should have the right to an effective review. Hence, the high burden of proof risks to distort competition and to counteract fair competition.

APPENDIX F:

THIRD DEBATE LICENTIATE ARTICLE

'Judgment confirms EU Directive's competition principle'

(2014) 3 *Upphandling 24 p* 11

(translated from the original Swedish language version titled
'Dom bekräftar EU-direktivets konkurrensprincip')

"Dom bekräftar EU-direktivets konkurrensprincip"

LOU borde ändras på flera punkter för att bättre främja sund konkurrens, anser Robert Moldén, EU-advokat. Han gläds över att en dom i Kammarrätten i Göteborg ligger helt i linje med den nya allmänna konkurrensprincipen som infördes i det nya klassiska direktivet som nyligen antogs av EU-parlamentet.

» LÄNGA OCH MYCKET omfattande ramavtal kan ha en konkurrensbegränsande effekt, särskilt vad gäller små och medelstora företags möjligheter att delta i upphandlingar.

Som doktorand inriktad på relationen mellan konkurrens och offentlig upphandling är det därför mycket glädjande att konstatera att Kammarrätten i Göteborg den 14 mars i år har avkunnat en principiellt viktig dom där kammarrätten faktiskt tillerkänner direktivets ramavtalsrelaterade konkurrensprincip direkt effekt med orden: "Otillbörlig och konkurrensnedvridande användning av ramavtal är förbjuden".*

Kammarrättens dom ligger helt i linje med den nya allmänna konkurrensrättsprincipen som infördes i det nya klassiska direktivet som nyligen antogs av EU-parlamentet. Enligt artikel 18 i nya direktivet gäller nämligen följande för alla upphandlingar: "Upphandlingen får inte utformas i syfte att [...] på ett konstgjort sätt begränsa konkurrensen".

Jag argumenterade i februarinumret av Upphandling 24 för att det nu är dags för den svenska lagstiftaren att implementera artikel 32 i 2004 års klassiska direktiv om att "upphandlande myndighet får inte använda ramavtal på otillbörligt sätt eller på ett sådant sätt att konkurrensen förhindras, begränsas eller snedvrids". Jag förde även fram att svenska domstolar, i avvaktan på erforderlig ändring av LOU, borde tillämpa direktivets ramavtalsrelaterade konkurrensprincip genom att ge artikel 32 i direktivet direkt effekt.

» JAG HAR i flera debattartiklar pekat på några av slutsatserna från min licentiatavhandling om relationen mellan konkurrens- och upphandlingsrätt som jag avser att lägga fram vid Lunds universitet senare i år.

Avhandlingen innehåller en lång rad konkreta förslag på hur LOU kan göras mer konkurrensfrämjande och jag vill ta upp ett mycket konkret förslag på hur LOU bör ändras för att göra den mer konkurrensfrämjande.

» OM MAN SOM företagare blir tillfrågad av ett annat företag om att lämna ett gemensamt anbud i en offentlig upphandling ligger det nära att fråga sig om det är lagligt eller inte.

Den företagare som söker sig till LOU kapitel 1, paragraf 11, får ett väldigt tydligt och positivt svar: "Grupper av leverantörer har rätt att ansöka om att få lämna ett anbud och att lämna ett anbud".

Problemet är att ett sådant gemensamt anbud, även om det är helt förenligt med LOU, samtidigt kan utgöra en mycket allvarlig överträdelse av konkurrensreglerna och ge höga böter för otillåten anbudskartell om företagarna hade kunnat lämnat anbud var för sig. se Konkurrensverkets interaktiva vägledning på korta.nu/lar41.

» JAG FÖRESLÅR DÄRFÖR att det i LOU införs en upplysning om att gemensamma anbud kan strida mot svenska och EUs konkurrensregler.

Otillåtet. Om företag väljer att lämna ett gemensamt anbud bör de tänka på att det kan vara en överträdelse av konkurrensreglerna, skriver Robert Moldén.

Det skulle kunna vara ett mycket enkelt och kostnadseffektivt sätt att göra LOU mer konkurrensfrämjande.

Robert Moldén
EU-advokat och delägare i Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet

* Se Kammarrätten i Göteborgs dom i mål nummer 4816-13, sida 3.

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Judgment confirms
EU Directive's competition principle

The Swedish Public Procurement Act should be modified in some points in order to promote fair competition, says Robert Molden, EU-advokat. He is delighted that a judgment of the Göteborg Administrative Court of Appeal is completely in line with the new general competition principle that was implemented in the new classic Directive which was recently adopted by the EU Parliament.

Long and very large framework agreements can have a competition restricting effect, especially when it comes to the chances of small and middle-sized companies to participate in procurements.

As a doctoral candidate specialized on relations between competition and public procurement, it is therefore delighting to note that the Göteborg Administrative Court of Appeal issued an important judgment on 14 March 2014 in which the court confirms the Directive's framework related competition principle direct effect by writing: "The inacceptable and competition distorting use of a framework agreement is prohibited".

The judgment of the Göteborg Administrative Court of Appeal is completely in line with the new general competition principal which was implemented in the new classic Directive that was recently adopted by the EU Parliament. According to Article 18 of the new Directive, the following applies for all procurements: "A procurement may not be designed with the intention [...] of artificially narrowing competition."

I reasoned in the February edition of Upphandling 24 that it is now time for the Swedish legislator to implement Article 32(1) of the 2004 classic Directive so that: "Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition". I continued that Swedish courts, pending the necessary modification in the Swedish Competition Act, should apply the Directive's framework related competition principle by giving Article 32 of the Directive direct effect.

In several articles, I have pointed out some of the conclusions from my doctoral dissertation about the relations between competition- and public procurement law, which I intend to submit at Lund's University later this year. My dissertation contains a number of concrete proposals as to how the Swedish Competition Act can get more competition friendly and I want to take up a concrete proposal as to how the Swedish Competition Act should be modified in order to be more competition friendly.

If a company gets asked by another company whether to hand in a joint tender for a public procurement, it will of course question whether that is legal or not.

The company that has a look into paragraph 11, Chapter 1 of the Swedish Public Procurement Act will get a very distinct and positive answer: "Groups of suppliers are entitled to apply to be allowed to submit a tender and to submit a tender."

The problem is that such a joint tender, even if it is completely in line with the Swedish Public Procurement Act, can at the same time infringe competition rules and cause high fines as an unlawful bid-rigging cartels if the companies would have been able to hand in the tender separately, see the Swedish Competition Authority's interactive guidelines at korta.nu/lar41.

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I therefore suggest that a reference should be inserted into the Swedish Public Procurement Act which states that a joint tender can infringe Swedish and EU competition rules.

That should be a smooth and cost efficient way to make the Swedish Public Procurement Act more competition friendly.

APPENDIX G:

FOURTH DEBATE LICENTIATE ARTICLE

'That's how the competition principle should be implemented in the new Swedish Public Procurement Act'

(2015) 1 *Upphandling 24 p* 13

(translated from the original Swedish language version titled 'Så bör konkurrensprincipen införas i nya LOU')

"Så bör konkurrensprincipen införas i nya LOU"

Genomförandeutredningens förslag rörande den nya konkurrensprincipen går inte tillräckligt långt, skriver Robert Moldén, EU-advokat. I tre debattartiklar under våren 2014 analyserade han den nya konkurrensprincipen. Här presenterar han förslag på hur den nya konkurrensprincipen bör införas i nya LOU för att vara förenlig med EU-rätten.

» **DET NYA KLASSISKA** direktivet som antogs av EU-parlamentet i januari 2014 innebär en märkbar skärpning av konkurrenskravet inom offentlig upphandling.

Enligt artikel 18 i nya direktivet gäller nämligen följande: "Upphandlingen får inte utformas i syfte att [...] på ett konstgjort sätt begränsa konkurrensen". Denna nya allmänna konkurrensprincip kommer inte bara att gälla vid upphandling av ramavtal utan vid all upphandling.

» **GENOMFÖRANDEUTREDNINGEN FÖRESLOG ATT** den nya allmänna konkurrensprincipen förs in fullt ut i nya LOU med följande lydelse: "En upphandling får inte utformas i syfte [...] att begränsa konkurrensen så att vissa leverantörer gynnas eller missgynnas på ett otillbörligt sätt". Utredningens förslag ligger alltså helt i linje med direktivet i denna del.

Långa och mycket omfattande ramavtal kan ha en konkurrensbegränsande effekt, särskilt vad gäller små och medelstora företags möjligheter att delta i upphandlingar. Därför har jag i tidigare nummer av Upphandling 24 samt i en omfattande artikel i Europarättslig Tidskrift argumenterat för att det nu är dags för den svenska lagstiftaren att implementera artikel 32 i 2004 års klassiska direktiv om att "en upphandlande myndighet får inte använda ramavtal på otillbörligt sätt eller på ett sådant sätt att konkurrensen förhindras, begränsas eller snedvrids".

» **MOT DENNA BAKGRUND** är det därför mycket nedslående att Genomförandeutredningen inte har tagit tillfället i akt att föra in den ramavtalsrelaterade konkurrensprincipen i LOU. En anledning kan vara att den ramavtalsrelaterade konkurrensprincipen har flyttats från själva artiklarna till preambeln, inledningen. Punkt 61 i preambeln till 2014 års direktiv har dock i princip precis samma lydelse som artikel 32 i 2004 års direktiv: "Ramavtal bör inte användas på ett otillbörligt sätt eller på ett sådant sätt att konkurrensen förhindras, begränsas eller snedvrids."

» **SÅ VITT JAG** har förstått har bestämmelsen i fråga flyttats från artiklarna till preambeln i direktivet för att hålla nere omfattningen på artiklarna. Det har däremot inte varit EU-lagstiftarens vilja att upphäva den ramavtalsrelaterade konkurrensprincipen. Jag instämmer i denna del i professor Sue Arrowsmiths bedömning, som i nya upplagan av sin ledande bok "The Law of Public and Utilities Procurement" (s. 1178) finner att det är sannolikt att EU-domstolen kommer att tillämpa den ramavtalsrelaterade konkurrensprincipen på samma sätt som tidigare även om den flyttats från artiklarna till preambeln i 2014 års upphandlingsdirektiv. Detta innebär att Genomförandeutredningens förslag inte går långt nog vad gäller den ramavtalsrelaterade konkurrensprincipen och sannolikt strider mot EU-rätten. Det är därför dags för lagstiftaren att ta nya tag för att fullt ut implementera EU:s upphandlingsrättsliga konkurrensprincip i svensk rätt!

Tråkigt. Det är mycket nedslående att Genomförandeutredningen inte passat på att föra in den ramavtalsrelaterade konkurrensprincipen i LOU, anser Robert Moldén.

Robert Moldén
EU-advokat och delägare i Gärde Wesslau samt doktorand i konkurrens- och upphandlingsrätt vid Lunds universitet

Robert Moldén har analyserat EUs upphandlingsrättsliga konkurrensprincip i en artikel i Europarättslig Tidskrift. Den finns att läsa på karta.nu/9xuqt

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"That's how the competition principle should be implemented in the new Swedish Public Procurement Act"

The implementation commission's proposal concerning the new competition principle does not go far enough, writes Robert Molden, EU-advokat. He analyzed the new competition principle in three articles, which were published during spring 2014. In this article, he will present a proposal as to how the new competition principle should be implemented into the new Swedish Public Procurement Act in order to be compatible with EU Law.

The new classic Directive, which was issued by the EU parliament in January 2014, contains a noticeable tightening of the competition requirement within public procurement.

According to Article 18 in the new directive the following applies: "The design of the procurement shall not be made with the intention [...] of artificially narrowing competition." This new competition principle will not only apply in connection to the procurement of framework agreements, but for every procurement.

The implementation commission suggested that the new general competition principal is implemented completely in the new Public Procurement Act as follows: "A procurement may not be designed in order [...] to restrict competition so that some contractors benefit or suffer unduly." So the proposal of the commission is completely in line with the Directive in this part.

Long and very large framework agreements can have a competition restricting effect, especially when it comes to the chances of small and middle-sized companies to participate in procurements. Hence, I reasoned in a earlier issue of Upphandling 24, as well as in an comprehensive article in Europarättslig tidskrift, that it is now time for the Swedish legislator to implement Article 32(1) of the 2004 classic directive so that "Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition."

Against this background, it is therefore very disappointing that the implementation commission did not take the initiative to implement the framework agreement related competition principle in the Swedish Public Procurement Act. One reason could be that the framework related competition principal has been moved from the articles to the preamble. Point 61 in the preamble of the 2014 Directive has basically the same wording as Article 32(1) of the 2004 Directive: "Framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition."

My understanding is that the provision in question moved from the articles to the preamble of the directive in order to shorten down the amount of articles. It was however not the EU legislator's intention to repeal the framework agreement related competition principle. I agree in this part with Professor Sue Arrowsmiths' views, which she presents in the new edition of her leading book "The law of Public and Utilities Procurement" (p. 1178), that the Court of Justice of the EU is going to apply the framework agreement related competition principal in the same way as before, even if it was moved from the articles to the preamble of the 2014 public procurement directive. That implicates that the implementation commission's suggestion does not go far enough as to the framework agreement related competition principle and supposedly infringes EU Law. It is therefore time for the legislator to take a new initiative in order to fully implement the EU competition principle into Swedish public procurement law.

APPENDIX H:

FIFTH DEBATE LICENTIATE ARTICLE

'Better Competition with Direct Effect'

Published on the Swedish on-line public procurement journal Inköpsrådet on 11 May 2016,

(translated from the original Swedish language version titled 'Bättre konkurrens med direkt effekt', www.inkopsradet.se)

Inköpsrådet

Bättre konkurrens med direkt effekt

2016-05-11 Konkurrens, Lagstiftning, Upphandling Robert Moldén

De nya upphandlingsdirektiven gör det enklare för mindre och nystartade företag att delta i upphandlingar. Robert Moldén reder ut begreppen kring direkt effekt, skärpta omsättningskrav och den nya konkurrensprincipen.

Ett av huvudsyftena med de nya upphandlingsdirektiven är att främja konkurrensen genom att göra det lättare för små- och medelstora företag att delta i offentliga upphandlingar. Detta kommer att bli tydligt när den nya lagen om offentlig upphandling väl träder i kraft i början av nästa år med drygt åtta månaders försening efter att sista implementeringsdatumet passerades i april.

Bestämmelser med direkt effekt

Vid ett välbesökt frukostseminarium presenterade Upphandlingsmyndigheten nyligen sina rekommendationer rörande vilka av direktivens bestämmelser som sannolikt har direkt effekt och som därför bör tillämpas av upphandlande myndigheter redan nu innan nya LOU träder i kraft. Läs mer på: Nyheterna i den kommande lagstiftningen och hur hanterar vi mellantiden.

Det är intressant att notera att Upphandlingsmyndigheten bedömer att flera av direktivens konkurrensfrämjande bestämmelser tillhör dem som har direkt effekt.

Gynnar seriösa företag

En viktig konkurrensfrämjande bestämmelse som sannolikt har direkt effekt, och därmed ska tillämpas av upphandlande myndigheter redan nu, är att omsättningskravet för att få delta i en offentlig upphandling inte får vara mer än

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dubbelt så högt som kontraktsvärdet. Detta kommer att göra det betydligt enklare för många små och nystartade företag att delta i upphandlingar. Det finns även flera direktivbestämmelser med direkt effekt som kommer att gynna alla typer av seriösa företag. Till exempel får seriösa företag rätt att i vissa situationer driva igenom att upphandlande myndigheter ingriper mot mindre seriösa företags onormalt låga anbud, vilket hittills har varit frivilligt för myndigheterna att göra.

Den nya konkurrensprincipen

En annan nyhet i direktiven som jag anser kan få stor praktisk betydelse för välskötta företag är **den nya konkurrensprincipen** som innebär att en upphandling inte får utformas i syfte att begränsa konkurrensen så att vissa leverantörer gynnas eller missgynnas på ett otillbörligt sätt. Europas ledande expert på konkurrensfrågor kopplade till offentlig upphandling, Albert Sánchez Graells, vid Bristols universitet, talade nyligen om detta på Upphandlingsdagarna och har gjort en sammanfattning på sin engelskspråkiga blogg. Läs mer här: Some thoughts on the principle of competition's direct and indirect effects in public procurement from 18 April 2016. .

Dessa frågor kommer även att belysas under Västsvenska Handelskammarens upphandlingsdag den 25 maj i Göteborg vid ett seminarium om Konkurrensprincipen och onormalt låga anbud tillsammans med Fredrik Rogö från Göteborgs upphandlingsbolag.

Bättre konkurrens direkt tack vare direkt effekt, alltså!

Robert Moldén

Better Competition with Direct Effect

The new public procurement directives make it easier for small and newly established companies to participate in public procurement proceedings. Robert Moldén analyses the issues of direct effect, new turnover requirements and the new competition principle.

One of the main purposes of the new public procurement directives is to enhance competition by making it easier for small and middle-sized companies to participate in public procurement proceedings. This will become evident when the new Swedish Public Procurement Act enters into force in the beginning of 2017 with a delay of eight months after the implementation deadline passed by in April 2016.

Provisions with direct effect

At a well-attended breakfast seminar, the Swedish National Agency for Public Procurement recently presented its recommendations as to which of the Directives' provisions probably have direct effect and therefore should be applied by contracting authorities already now before the new Swedish Public Procurement Act enters into force.

It is interesting to note that the Swedish National Agency for Public Procurement considers that several of the pro-competitive provisions of the new Directives have direct effect.

Favours serious companies

An important pro-competitive provision that probably has direct effect, and therefore has to be applied by contracting authorities already now, is that the turnover requirement for participating in a public procurement proceeding may not exceed twice the contract value. This should make it considerably easier for many small and newly established companies to participate in public procurement proceedings. There are several of the Directives' provisions with direct effect which will benefit all types of serious companies. For example, serious companies are, under certain circumstances, entitled to request that contracting authorities take action against abnormally low tenders given by less serious companies, which before has not been mandatory for contracting authorities to do.

The new competition principle

Another novelty in the new Directives, which I think will have significant practical impacts for well-run companies is the new **competition principle**, according to which a public procurement proceeding may not be designed in order to restrict competition so that some contractors benefit or suffer unduly. Europe's leading expert on competition issues related to public procurement, Albert Sánchez Graells from the University of Bristol, recently talked about this issue at the Swedish public procurement conference *Upphandlingsdagarna* and has provided a summary on his English language blog How to Crack a Nut in an article titled: "Some thoughts on the principle of competition's direct and indirect effects in public procurement from 18 April 2016".

These issues will also be discussed at the Swedish public procurement conference *Västsvenska Handelskammarens upphandlingsdag* on 25 May 2016 in Gothenburg at a seminar on The Competition Principle and Abnormally Low Tenders together with Fredrik Rogö from the City of Gothenburg's Procurement Company.

More competition thanks to direct effect is thus the message!

Robert Moldén

Part III:
The two new doctoral articles

APPENDIX I:

FIRST DOCTORAL ARTICLE

'Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of the Swedish and EU competition law as to the burden of proof'

(2018) *21 Europarättslig Tidskrift 593-657*

BID-RIGGING AND PUBLIC PROCUREMENT RELATED INFORMATION EXCHANGE

– How the European Convention on Human Rights as well as the Cartes Bancaires and the Alfa Quality Moving landmark judgments transform the application of Swedish and EU competition law as to the burden of proof

Robert Moldén*

1. INTRODUCTION

1.1 Purpose and Structure of this Article

At the international conference "Current trends in Slovak and European Competition law" organized by the Slovak Competition Authority and the University of Bratislava in May 2016 the author of this article was invited to make a

* Head of the Competition Law Practice Group at the Swedish law firm Front Advokater, Jur. lic. and Doctoral Candidate in competition and public procurement law at the Stockholm School of Economics as well as guest lecturer at the International Master in Public Procurement Management program at the University of Rome Tor Vergata and at the University of Belgrade; former Senior Case Officer at the Swedish Competition Authority and former Associated Judge at the Administrative Court of Appeal in Göteborg. The author is a lawyer holding LL.M. degrees in Swedish law (University of Stockholm), German law (University of Kiel) and European law (College of Europe in Bruges). He is also an economist holding master degrees in Economics and Business Administration from the University of Paris as well as the Göteborg and Stockholm Schools of Economics. The author is grateful for valuable comments and advice from the supervisors of his doctoral thesis, Lars Henriksson (professor in law at the Stockholm School of Economics), Ulf Bernitz (professor in law at Stockholm University) and Mats Bergman (professor in Economics at Södertörn University in Stockholm, former chief economist at the Swedish Competition Authority). The author is also grateful for comments from his fellow doctoral candidates at the Stockholm School of Economics, Dagne Sabockis, Viktor Söderberg and Johan Hedelin, from the competition respectively public procurement law experts Eric Ericsson at Eric Ericsson Advokat and Christoffer Stavenow at

presentation on recent developments as to bid-rigging cartels and joint bidding cases in Sweden and the other Nordic countries, in view of the pioneer role taken by the Swedish and the Nordic Competition Authorities in this area of competition law.

The present article follows the structure of the Bratislava presentation and updates as well as considerably develops the author's earlier article "Public Procurement and Competition Law From a Swedish Perspective – Some Proposals for Better Interaction" published in Europarättslig Tidskrift in December 2012, where the subjects of bid-rigging and anti-competitive information exchange were two out of several issues related to the interaction between public procurement and competition law to be analysed.[1]

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.[2] For the benefit 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 also designed to be able to be used as course literature for Swedish and Nordic students in competition and public procurement law, which is one reason why the author has chosen to include relatively

Stavenow & Partners Advokatbyrå as well from his brother Richard Jacobsson (Head of the IP and Competition Law Practice Group at Eversheds Sutherland Advokatbyrå). Moreover, the author would like to thank his colleagues at the Competition Law and Public Procurement Law Practice Groups at former Gärde Wesslau – now Front Advokater respectively Wesslau Söderqvist for valuable comments and support, in particular Roland Adrell, Kaisa Adlercreutz, Åke Lewensjö, Johan Lidén, Svante Hjertén, Christian Martinsson, Sara Fogelberg, Amir Daneshpip, Erik Sjöberg, Beata Fahlvik and John Spiegel at Front Advokater, as well as Henrik Nilsson and Hans Nordström at Wesslau Söderqvist Advokatbyrå. Moreover, the author is grateful for enriching discussions with professor Gustavo Piga, professor Annalisa Castelli and professor Paolo Buccirossi while teaching at the University of Rome Tor Vergata International Master in Public Procurement Management program during the last four years. Finally, the author is grateful for support from Jolanta, Sofie, Julia and Marie Moldén. This article is part of a research project on public procurement and competition law financed by the Council for Research Issues at the Swedish Competition Authority and directed by professor Lars Henriksson. The author welcomes comments and suggestions related to this article to robert.molden@front.law.

1 "Public Procurement and Competition Law From a Swedish Perspective – Some Proposals for Better Interaction" (2012) 15 *Europarättslig Tidskrift* 557–615. This article has also been published on the website of the Swedish Competition Authority: http://www.konkurrensverket.se/globalassets/forskning/projekt/09-0062_artikel_robert-molden_public-procurement-and-competition-law-from-a-swedish-perspective-some-proposals-for-better-interaction.pdf.

2 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.

comprehensive quotes from the approximately 20 judgments from Sweden and the EU analysed in depth in this article, including one interesting judgment each from Norway, Finland and Denmark. Moreover, in view of the pioneer role taken by the Swedish and the Nordic Competition Authorities in this area of competition law, the present article can be used as course literature for students at universities in other EU countries, such as the students at the International Master Program in Public Procurement Management at the University of Rome Tor Vergata and at the University of Belgrade where the author has been teaching on the interaction between competition and public procurement law for several years.[3]

This article is the last but one in a series of articles related to public procurement and anti-competitive information exchange, which, taken together, shall be presented as the author's doctoral thesis in competition and public procurement law at the Stockholm School of Economics in early 2019.[4] The last article in this series will focus on the new competition principle in the new EU Public Procurement Directives and is due to be published in the next issue of Europarättslig Tidskrift in March 2019. Any comments and suggestions will therefore be very much appreciated and taken into account when preparing the final doctoral thesis.[5]

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 on 1 January 2017. In this article, the Act will be referred to as **LOU** which is the established Swedish abbreviation for "Lag (2016:1145) om offentlig upphandling".[6] LOU imple-

[3] For information on this excellent and truly international postgraduate master program (IMPPM) directed by professor Gustavo Piga and attracting outstanding public procurement officials from many countries around the world, see http://www.masterprocurement.eu/.

[4] On 15 December 2016, some of the earlier articles were presented as parts of the author's licentiate dissertation at the Stockholm School of Economics with the title "Competition and Public Procurement – With Special Focus on Pro-competitive and Anti-competitive Information Exchange as well as the New Competition Principle of the New EU Public Procurement Directives". The licentiate dissertation has been published on the website of the Swedish Competition Authority: http://www.konkurrensverket.se/globalassets/forskning/projekt/09-0062_robert-moldens-licentiate-thesis_15december2016.pdf.

[5] The author welcomes comments and suggestions related to this article to robert.molden@front.law.

[6] The Swedish Competition Authority has published a non-official translation of LOU into English, which is used in this article and can be downloaded under: http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/swedish-public-procurement-act.pdf. The leading Swedish introductory textbook in the field of public procurement law is Kristian Pedersen, *Upphandlingens grunder* (Jure Förlag AB, fourth edition, 2017). The leading handbook is Helena Rosén Andersson, Eva-Maj Mühlenbock, Henrik Willquist and Catharina Piper, Lagen om offentlig upphandling – En kommentar (Norstedts Juridik, sec-

ments Directive 2014/24/EU concerning public procurement in the classical sector.[7] 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 Public Procurement Act in the Utilities Sectors. In this article, the Act will be referred to as **LUF**, which is the established Swedish abbreviation for "Lag (2016:1146) om upphandling inom försörjningssektorerna". LUF implements Directive 2014/25/EU concerning public procurement in the Utilities sectors.[8] In this article, this Directive will be referred to as the **Utilities Sector Directive**.

As to the new Swedish Concessions Procurement Act of 2017[9] and the Swedish Defence and Security Procurement Act[10], these Acts will not be analysed in this article.

Swedish competition law is governed by the Swedish Competition Act of 2008[11] containing provisions prohibiting anti-competitive agreements and

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ond edition, 2015). 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). The leading book on the interaction between competition and public procurement is *Public Procurement and the EU Competition Rules*, written by Albert Sánchez Graells (Bloomsbury, second edition, 2015). In 2009, the OECD published its *Guidelines for Fighting Bid Rigging in Public Procurement – Helping governments to obtain best value for money*: https://www.oecd.org/competition/cartels/42851044.pdf.

7 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

8 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. As to the new Swedish Concessions Procurement Act of 2017, "Lag (2016:1147) om upphandling av koncessioner" implementing Directive 2014/23/EU, as well as the Swedish Defence and Security Procurement Act, "Lag (2011:1029) om Upphandling på försvars- och säkerhetsområdet") implementing Directive 2009/81/EU, these Acts will not be analysed in this article.

9 "Lag (2016:1147) om upphandling av koncessioner", implementing Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

10 "Lag (2011:1029) om Upphandling på försvars- och säkerhetsområdet"), implementing Directive 2009/81/EU of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

11 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 is used in this article and can be downloaded under: http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-swedish-competition-rules--an-introduction.pdf. The Swedish Competition Authority has also published a non-official translation into English of the Swedish Competition Act, which can be downloaded under: http://www.konkurrensverket.se/globalassets/english/competition/the-swedish-competition-act.pdf.

The leading Swedish introductory textbook in the field of competition law is Leif Gustafsson and Jacob Westin, *Konkurrensreglerna i klartext* (Norstedts Juridik, 2016). The leading

abuse of a dominant position, which constitute copies of Articles 101 and 102 TFEU. According to the *travaux préparatoires* behind the preceding Competition Act, The Swedish Competition Act of 1993, Konkurrenslagen (1993:20), 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 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 effectuated 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 160 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] as well as 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

handbooks are Johan Karlsson and Marie Östman, *Konkurrensrätt – En handbok* (Karnov Group, fifth edition, 2014) as well as Kenny Carlsson and Mats Bergman, *Konkurrenslagen – En kommentar* (Norstedts Juridik, second edition, 2015).

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 as well as information activities of the Swedish National Board for Public Procurement (Nämnden för offentlig upphandling – NOU) were transferred to the Swedish Competition Authority, www.kkv.se. On 1 September 2015, the information activities were transferred from the Swedish Competition Authority to a new National Agency for Public Procurement (Upphandlingsmyndigheten), www.upphandlingsmyndigheten.se. However, the responsibility for enforcing public procurement law has remained with 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 (3) 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.

be appealed to the Swedish Patent and Market Court at the Stockholm District Court.[19]

A peculiarity of Swedish procedural competition law consists of the fact that the Swedish Competition Authority may not take any mandatory decision on its own to impose fines for breaches of Swedish or EU competition law. In these cases, the Swedish Competition Authority has to start proceedings against the undertakings involved at the Swedish Patent and Market Court at the Stockholm District Court.[20] It is thus the Swedish Patent and Market Court which may impose a fine, as a first instance court.

The judgments of the Swedish Patent and Market Court can only be appealed to the Swedish Patent and Market Court of Appeal at the Svea Court of Appeal.[21] The general rule is that a further appeal to the Swedish Supreme Court is not possible. The Swedish Act on Patent and Market Courts of 2016[22] does allow exceptions from this regulation, however, only when the Swedish Patent and Market Court of Appeal deems such an appeal to be needed. According to the preparatory works behind the Act on Patent and Market Courts of 2016, an appeal to the Swedish Supreme Court could come into question only if there is a general need for a more overarching precedent where other areas of law come into play as well.[23] There are no known judgments that have been successfully appealed to the Swedish Supreme Court under this regulation yet.

A 2016 government-commissioned report proposed expanding the powers of the Swedish Competition Authority to also include the issuing of fines without a prior ruling of the Patent and Market Court. The idea was to align the Swedish Competition Authority's powers with those of the European Commission as well as to make the enforcement of competition law more effective.[24] The Swedish Parliament finally chose not to expand the powers of the Swedish Competition Authority to include the issuing of fines without a prior ruling of the Swedish Patent and Market Court. However, as from 1 January 2018, the Swedish Competition Authority obtained the power to adopt decisions prohibiting a merger without having to go to court to do so.[25]

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19 Chapter 7, Article 1 of the Swedish Competition Act.

20 Chapter 3, Article 5 of the Swedish Competition Act. http://www.stockholmstingsratt.se/Om-tingsratten/Patent--och-marknadsdomstolen/.

21 Patent- och marknadsöverdomstolen, www.patentochmarknadsoverdomstolen.se. Patent- och marknadsöverdomstolen replaced the previous Marknadsdomstolen on the 1 September 2016.

22 Lag (2016:188) om patent- och marknadsdomstolar.

23 See prop. 2015/16:57, p. 165.

24 See Swedish Government Official Report SOU 2016:49 on expanding the decisive rights for the Swedish Competition Authority (En utökad beslutanderätt för Konkurrensverket).

25 Chapter 4, Article 1 of the Swedish Competition Act. According to Chapter 4, Articles 15 and 16, such a prohibition decision may be appealed to the Swedish Patent and Market Court and then to the Swedish Patent and Market Court of Appeal.

2. BID-RIGGING CARTELS AND JOINT BIDDING RELATED TO PUBLIC PROCUREMENT

2.1 Relevant legislation on bid-rigging cartels and joint bidding

Imagine that your company is contacted by another firm in the same industry with a proposal to submit 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 4, Article 5**
> **A group of suppliers may participate in a procurement. A contracting authority may not impose conditions that such a group must have a specific legal form in order to be allowed to submit a request to participate or a tender.** The contracting authority may, however, require that such a group has a specific legal form when it has been awarded the contract, if this is necessary for the satisfactory contract performance.
>
> The contracting authority may state in the procurement documents how a group of suppliers shall satisfy the requirements on economic and financial standing in the meaning of Chapter 14 Articles 3 and 4, or technical knowledge and professional experience in the meaning of Chapter 14 Article 5, if this is justified for objective reasons.
>
> The authority may establish specific conditions regarding how a group of suppliers shall perform the contract, if this is justified for objective reasons."[26] (emphasis added)

> **"LOU Chapter 14, Article 6**
> **A supplier may for a certain contract rely on the capacity of other companies to satisfy requirements relating to economic and financial standing or technical and professional capacity** under Article 1 first paragraph items 2 and 3. When the capacity relates to academic or professional qualifications in the meaning of Chapter 15 Article 11 item 7, the supplier may only rely on the capacity of another company if that company will also perform the services or works for which this capacity is needed.
>
> The first paragraph applies irrespective of the type of legal connection between the supplier and the companies. It is the supplier that must show that it will dispose of the resources necessary when the contract is to be performed."[27] (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

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[26] This Article implements Article 19 (2) of the Classical Sector Directive.
[27] This Article implements Article 63 of the Classical Sector Directive.

2, Article 1 of the Swedish Competition Act, with fines imposed up to 10 % of the co-operating companies' turnover.

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

> **"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; …'"

The overview of cases in section 2.2 below will show that this is not only a theoretical risk. Indeed, the Swedish Competition Authority has taken a very tough approach against bid-rigging even when effectuated openly or among small and medium-sized enterprises (SMEs).

2.2 Swedish case law on bid-rigging cartels and joint bidding related to public procurement

2.2.1 The Asphalt Case of 2009 – Swedish Market Court[28]

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 so far, 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

[28] Judgment of the Swedish Market Court in Case MD 2009:11, of 28 May 2009.

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."[29]

2.2.2 The Power Supply Poles Case of 2009 – Swedish Competition Authority[30]

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 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.[31] The fine proposed to Rundvirke Poles AB was considerably reduced due to its active cooperation in the investigation.

2.2.3 The Transport of Deceased Case of 2010 – Swedish Competition Authority[32]

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

[29] Judgment of the Swedish Market Court in Case MD 2009:11 of 28 May 2009, p. 87–88. The author of this article worked for the Swedish Competition Authority at that time and provided legal advice to the case team in this matter.

[30] Fine order of the SCA in Case 237/2007 of 30 June 2009.

[31] 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.

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

accept the non-mandatory fine orders proposed by the Swedish Competition Authority, which amounted to approximately 40 000 SEK respectively 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.

2.2.4 The Burnt Waste Transport Case of 2011 – Swedish Competition Authority[33]

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 competition 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.

2.2.5 The Tyres Case of 2014 – Stockholm District Court[34]

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.[35] 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, through the Swedish Tyres Association (Svenska Däckföreningen). 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 stated 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

[33] Fine order of the Swedish Competition Authority in Case 327/2010 of 1 December 2011.
[34] Judgment of the Stockholm District Court in Case T 18896-10 on 21 January 2014.
[35] Plaint filed by the Swedish Competition Authority in Case 605/2010 on 24 November 2010.

> 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."[36]

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 reflects the relevant provisions of the Horizontal Guidelines issued by the European Commission, which stipulate the following:

> "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)."[37] (emphasis added)

The crucial issue here is who actually has the burden of proof, the Swedish Competition Authority or the undertakings at hand?

In its judgment of 21 January 2014, the Stockholm District Court provided the following interesting in-depth analysis on the principles applicable when determining who has the burden of proof in this case:

> **"General considerations concerning the burden of proof and standard of proof concerning the capacity to submit a tender on its own etc.**
> The Swedish Competition Authority has presented convincing evidence showing that Däckia and Euromaster have participated in pure sales cooperation related to public procurement proceedings handled by Gästrike Inköps and the Swedish Police Authority during the year 2005. As already has been mentioned, the burden of proof is on the Swedish Competition Authority to prove that the alleged infringements have occurred. The question is how the burden of proof is to be placed and which standard of proof should apply as to the objection raised by Däckia and Euromaster that the tenders have been lawful. In principle, the situation is such that the defendants, confronted with a comprehensive investigation showing that pure sales cooperation has occurred, raise an objection of a lawful bidding consortium.

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

[37] 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, para. 237.

With regard to the character of the procurement proceedings, the objection raised by Däckia and Euromaster in reality amounts to that they were not actual or potential competitors related to the procurement proceedings handled by Gästrike Inköps respectively the Swedish Police Authority, which is why the tender of the Swedish Police Authority has not constituted sales cooperation between competitors.

A possible way of placing the burden of proof would be, as in criminal cases, to place the burden of proof on the Swedish Competition Authority to refute such an objection and that the standard of proof is placed so that the Swedish Competition Authority has to submit so much evidence that the objection can be considered unfounded (see the judgmendt of the Swedish Supreme Court in Case NJA 2009 p. 234). However, such a solution would not be suitable. In view of the question of standard of proof being regulated in Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (below referred to as Regulation 1/2003), and the close conformity with EU law envisaged by the Swedish Competition Act, guidance on the placement of the burden of proof should in the first place instead be taken from EU law.

According to general principles of EU law, the presumption of innocence is applied in matters concerning the infringement of competition law applicable to undertakings and which can lead to fines or penalties being imposed. (Hüls, paragraphs 150, 154). The principle of innocence follows, *inter alia*, from Article 6.2 of the European Convention on Human Rights.

According to well-established case law in competition law cases, it is up to an undertaking which has been found to have acted in a way which normally constitutes an infringement, to submit evidence which prove the opposite. Such a rule does not reverse the burden of proof in an illicit way (Hüls, cited above, paragraph 155, also Montecatini, cited above, paragraph 18). It concerns an action not amenable to out-of-court settlement according to the Swedish Competition Act. **The Stockholm District Court considers that the undertakings have the burden of proof as to the assertion that decision of the Swedish Tyres Association to submit common prices have been necessary for being able to submit a tender.** If the burden of proof for such assertions is placed on the Swedish Competition Authority, it would become extremely difficult for the Authority to prove infringements, because an ex post analysis of the undertaking's supply capacity depends on a very thorough analysis of the concerned undertakings' internal operations, in a way which is difficult to achieve even with the far-reaching investigation powers entrusted on the Swedish Competition Authority. Moreover, the undertakings are free to submit new objections during the process, which is after the investigation has been concluded. It would therefore be inappropriate to place the burden of proof on the Swedish Competition Authority to refute the undertakings' objections. Instead, the burden of proof for such an objection at hand in this case should instead be on the undertakings themselves in accordance with the principle according to which the burden of proof is to be placed on the party best placed to secure the evidence. The undertakings are indeed best placed to secure evidence themselves as to the lack of capacity to submit a tender on their own.

> The Stockholm District Court considers that the standard of proof for the undertakings to prove their objection should not be particularly high."[38] (author's translation and emphasis)

The Stockholm District Court found that Däckia and Euromaster had not proven that it was objectively necessary for them to co-operate by way of joint bidding and that their joint bidding therefore constituted an infringement by object. Däckia and Euromaster were requested to pay fines of 1,3 MSEK respectively 1,2 MSEK.[39]

2.2.6 The Aleris Clinical Physiology Services Case of 2017 – Swedish Patent and Market Court of Appeal[40]

In its judgment of 18 December 2015, the Stockholm District Court imposed fines on the undertakings Aleris Diagnostik Ab, Capio S:t Göran Sjukhus AB and Hjärtkärlgruppen i Sverige AB of 25.3 MSEK, 1.1 MSEK and 2,1 MSEK respectively, for anti-competive cooperation related to a public procurement proceeding concerning clinical physiology services conducted by the County of Stockholm. One of the legal arguments raised by some of the undertakings before the Stockholm District Court was that they lacked capacity to submit tenders on their own without cooperation with the other undertakings at hand. In this regard, the Stockholm District reasoned as follows:

> *"General considerations concerning the burden of proof and standard of proof concerning the capacity to submit a tender on its own etc.*
> The question arises as to how the burden of proof should be placed and what the standard of proof should be concerning the objection raised claiming that the co-operation agreements have been legal because of lack of capacity.
>
> A possible way of placing the burden of proof would be, as in criminal cases, to place the burden of proof on the Swedish Competition Authority to refute such an objection and that the standard of proof is placed so that the Swedish Competition Authority have to submit so much evidence that the objection can be considered unfounded (see judgment of the Swedish Supreme Court in Case NJA 2009 p. 234). However, such a solution would not be suitable. In view of the question of standard of proof being regulated in Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (below referred to as Regulation 1/2003), and the close conformity with EU law envisaged by the Swedish Competition Act, guidance

[38] Judgment of the Stockholm District Court on 21 January 2018 in Case T 18896-10, p. 118–119.

[39] The judgment of the Stockholm District was not appealed to the Swedish Market Court. However, in its earlier judgment of 22 August 2012 in Case MD 2012:9, the Swedish Market Court has found that the alleged infringements were not time-barred.

[40] Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 7497-16 on 28 April 2017.

> on the placement of the burden of proof should in the first place instead be taken from EU law.
>
> As set out above, according to general principles of EU law, the presumption of innocence is applied in matters concerning the infringement of competition law applicable to undertakings and which can lead to fines or penalties being imposed. According to well-established case law in competition law cases, it is up to an undertaking which has been found to have acted in a way which normally constitutes an infringement, to submit evidence which proves the opposite. Such a rule does not reverse the burden of proof in an illicit way (Hüls, cited above, paragraph 155, also Montecatini, cited above, paragraph 18).
>
> This case concerns an action not amenable to out-of-court settlement according to the Swedish Competition Act. **The Stockholm District Court considers that the undertakings have the burden of proof as to the assertion that the cooperation agreements have been necessary for being able to submit a tender.** If the burden of proof for such assertions is placed on the Swedish Competition Authority, it would become extremely difficult for the Authority to prove infringements, because an ex post analysis of the undertaking's supply capacity depends on a very thorough analysis of the concerned undertakings' internal operations, in a way which is difficult to achieve even with the far-reaching investigation powers entrusted on the Swedish Competition Authority. Moreover, the undertakings are free to submit new objections during the process, which is after the investigation has been concluded. It would therefore be inappropriate to place the burden of proof on the Swedish Competition Authority to refute the undertakings' objections. Instead, the burden of proof for such an objection at hand in this case should instead be on the undertakings themselves in accordance with the principle according to which the burden of proof is to be placed on the party best placed to secure the evidence. The undertakings are indeed best placed to secure evidence themselves as to the lack of capacity to submit a tender on their own.
>
> The Stockholm District Court considers that the standard of proof for the undertakings to prove their objection should not be particularly high."[41] (author's translation and emphasis)

The Stockholm District Court found that the undertakings did not fulfill the burden of proof to show that there was a lack of capacity which made it objectively necessary to cooperate in the way at hand.

The judgment of the Stockholm District Court was appealed to the Swedish Patent and Market Court of Appeal. In its landmark judgment of 28 April 2017, the Swedish Patent and Market Court of Appeal annulled the judgment of the Stockholm District Court. However, the issue of interest for the present article – whether the Swedish Competition Authority or the parties have the burden of proof for proving that the parties had the capacity, respectively not the capacity to submit tenders on their own – was not at all subject to analysis in the judgment of the Swedish Patent and Market Court of Appeal. The reason for this is that the Swedish Patent and Market Court of Appeal ruled out that

[41] Judgment of the Stockholm District Court on 18 December 2015 in Case T 12305-13, p. 176–177.

the cooperation could be regarded as an infringement by object irrespectively of whether there was a lack of capacity or not, by looking at the cooperation in its economic and legal context, as follows from the following quote:

> "The Swedish Patent and Market Court of Appeal notes that the agreements were entered into before a public procurement proceeding, where the buyer of the services had almost a de facto monopoly (a so called monopsony). Moreover, the Court notes that the buyer had decided that the lowest price should be the sole evaluation criterion in the procurement and that only a limited number of suppliers were to be appointed. At the time of entering into the agreements, the parties to the agreements could not be sure to supply any services at all, instead they risked having to leave the market.
>
> It is true that the fact that the county had decided that only a limited amount of service suppliers could be appointed could have led to the assumption that only those undertakings that could offer a relatively high supply capacity would have a chance to win the procurement proceeding. However, the fact that price was the only evaluation criterion meant, as the Stockholm District Court has pointed out, (p. 183), that the county had no legal way to favour suppliers with a high supply capacity. A supplier having offered a low price therefore could not on legal grounds be disregarded based on its limited supply capacity.
>
> There is no evidence neither in the agreements nor in what has become known concerning the contacts between the parties to prove that certain specified volumes of the services in question have been shared between the undertakings in such a way that certain parts have been assigned to the contracting parties.
>
> The limitation to 50 % of the possibility to become subcontractor which is in Aleris' agreement with Capio cannot either be regarded as a partitioning of a given volume which is comparable to market sharing in the meaning set out above. From the "Invitation to tender" it follows explicitly that "The County of Stockholm does not offer any guarantees as to service volume". The fact that the procurement documents contained a volume prognosis "not binding for the County of Stockholm" concerning purchased divided per object during the year 2007 (see request for tender paragraph 1.2) does not change the situation.
>
> Against this background, the mentioned contract clauses can be said to constitute a conditional obligation on one of the parties upon request to appoint the other party as a subcontractor concerning a non-defined quantity of potentially won services and thereby provide access to the market. The question at hand is whether such an agreement can be said to belong to the category of cooperation which is so harmful to competition that no analysis of any potential anti-competitive result needs to be done.
>
> An essential point of departure for assessing the agreements is, as mentioned above, that the county in principle was the only buyer of the health care services in question and that the possibility for suppliers to be active on this market was decided by way of public procurement every few years. Keeping several potential suppliers between the occasions for procurement can in such a situation to a certain degree be pro-competitive, because undertakings which are knocked out from the market are unlikely to participate in future procurement proceedings. Moreover, certain types of cooperation related to procurement proceedings may be both useful and to the benefit of the buyer.
>
> As to the clause on volume limitation, it follows from the email conversation at hand in the case (see the judgment of the Stockholm District Court, p. 155–158)

how it was incorporated in the agreement between Aleris and Capio. From the interrogation with E.T. it follows that Capio wished to limit the volume to the subcontractor because Capio could not refrain from all of the potential volume to Aleris, as Capio needed to effectuate also so called referral examinations at S:t Görans hospital. Furthermore, it follows from the witness examination that the volume of examinations the clinic would obtain from the hospital was not sufficient to maintain the staff's necessary competence.

As to the fact that the undertakings agreed to submit tenders with maximum volume for services previously provided by the undertakings and a minimum obligation for Capio concerning sleep apnea examinations, it has not led to a reduction of uncertainty as to how the undertakings would act on the market in a way which could impair competition. The situation would have been different if the agreements had amounted to limitations on the undertaking when submitting tenders. In that case the practice could have been characterized as a market sharing cartel, where the number of competitors was limited leading to higher prices and worse quality.

Considering these circumstances and as no specific volumes have been shared between the parties, the agreements between the parties cannot in view of existing case law be considered to have the object to limit competition."[42] (author's translation and emphasis)

2.2.7 The Commercial Kitchen Equipment Case of 2017 – Swedish Competition Authority[43]

In 2016, the central purchasing authority SKL Kommentus Inköpscentral AB conducted a public procurement proceeding concerning the supply of professional kitchen equipment, on behalf of contracting authorities in all of Sweden's 21 counties. It was not necessary for interested suppliers to submit tenders for all of the counties. However, if a supplier chose to submit tenders for more than one county lot, the prices offered for the different county lots had to be the same.

Following a complaint, the Swedish Competition Authority started an investigating against seven resellers of Electrolux' professional kitchen equipment. The Swedish Competition Authority found that six out these seven resellers had offered identical prices for identical products in their different tenders, while the seventh reseller had offered very similar products at very similar prices in its tender. Moreover, the Swedish Competition Authority found out that no one of the seven resellers had submitted tenders for a county lot where one of the other six resellers had submitted tenders.

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[42] Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 7497-16, p. 12–14.

[43] Decision to close the case of the Swedish Competition Authority in Matter 741/2016 of 6 December 2017.

In other words, the Swedish Competition Authority had secured evidence for what normally would have constituted a very harmful bid-rigging and market sharing cartel agreement. Still, the Swedish Competition Authority in its decision of 6 December 2017 decided to close the case, which on first sight seems puzzling. However, in its well-reasoned decision, the Swedish Competition Authority provides the following facts as to the economic and legal context of the cooperation between the seven resellers.

Until 2005, Electrolux Equipment handled sales in-house. In 2005, Electrolux restructured its sales organization and a number of employees were offered the opportunity to start own firms and to become resellers for Electrolux Professional. All of the seven resellers were part of an exclusive distribution system set up by Electrolux Professional, whereby each of the seven resellers had been attributed a number of counties in which each reseller had the exclusive right to perform active sales. Each of the seven resellers had submitted tenders for all of those county lots where they had the exclusive right to perform active sales in, while not submitting any tenders for county lots where another reseller had the exclusive right to perform active sales in.

In 2012, SKL Kommentus Inköpscentral AB had conducted a similar public procurement proceeding. At that occasion, Electrolux Professional submitted tenders on its own, using the seven resellers as sub-contractors. However, in the 2016 public procurement proceeding at hand it is no longer possible for subcontractors to directly invoice the contracting authorities, which according to the investigation conducted by the Swedish Competition Authority was the actual reason for each of the seven resellers submitting tenders instead of Electrolux Professional directly.

The Swedish Competition Authority stated that in view of an overall assessment of the facts at hand it decided not to pursue the investigation, while stating that the decision to close the case does not constitute any formal assessment of whether the practice infringes competition law.

In the author's view, this is a very interesting case and actually a text book example for how to perform an analysis of whether a practice may constitute a by object infringement or not, by subjecting the practice to a balanced assessment of the economic and legal context. In this case, both the economic and legal context indicate that the practice cannot constitute an infringement by object. In the absence of anti-competitive effects, it was therefore a prudent and well-founded decision of the Swedish Competition Authority to close this case and not take it to the Patent and Market Court. Moreover, this case constitutes a textbook example for how a Competition Authority should formulate such a decision to close a case. Even if only five pages long, the decision contains the factual information necessary for the reader to understand the reasoning of the Authority and to obtain some form of guidance as to current practice in

the field of handling cases of potential bid-rigging and market sharing by the Swedish Competition Authority.

2.3 Examples of Nordic case law on bid-rigging cartels and joint bidding related to public procurement

2.3.1 The Norwegian Taxi Case of 2016 – EFTA Court[44]

Back in 2001, the two Norwegian taxi companies Ski Taxi and Follo Taxi had established a joint management company, Ski Follo Taxidrift (SFD), to carry out administrative activities for its shareholders' respective dispatch centers. In 2010, Oslo University Hospital conducted two public procurement proceedings for patient transport services. SFD submitted joint tenders on behalf of Ski Taxi and Follo Taxi in both procurement proceedings. Subsequent to a complaint from the Oslo University Hospital, the Norwegian Competition Authority found that the undertakings' cooperation had infringed Norwegian Competition law. According to the Authority, Ski Taxi and Follo Taxi could have submitted tenders on their own in both procurement proceedings and the cooperation had therefore as its object the restriction of competition. On 8 February 2018, the Follo District Court annulled the decision of the Norwegian Competition Authority, finding that Ski Taxi and Follo Taxi had not been potential competitors regarding the first procurement proceeding and only partially competitors as regards the second procurement proceeding. By judgment of 17 March 2015, the Borgarting Court of Appeal upheld the decision of the Norwegian Competition Authority, finding that Ski Taxi and Follo Taxi were competitors in both procurement proceedings and that their cooperation therefore constituted an infringement by object. The fines imposed on Ski Taxi, Follo Taxi and SFD were sat at NOK 100 000, NOK 200 000 respectiely NOK 1 million. The undertakings challenged the judgment of the Borgarting Court of Appeal to the Norwegian Supreme Court, which on 24 February 2016 made a request to the EFTA Court and posed a number of questions related to the issue whether the cooperation at hand can be regarded as in infringement by object.

As to *how to assess whether a certain cooperation has an anti-competitive object*, the EFTA court stated:

> "In that regard, the Court notes, first, that consideration of the economic and legal context of the agreement is required in order to characterise a restriction of competition within the meaning of Article 53(1) EEA. Therefore, the obligation to take account of the legal and economic context is imposed for the purpose of ascertaining both the object and effect of the agreement (compare judgments in *GlaxoSmith-Kline Services* v *Commission*, T-168/01, EU:T:2006:265, paragraph 110 and case law cited, and *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 49).

[44] Judgment of the EFTA Court in Case E-3-16.

Second, the Court holds that, given the consequences that flow from classification of an agreement as a restriction of competition by object, that concept must be interpreted restrictively in the sense that it can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (compare the judgment in *CB* v *Commission*, cited above, paragraph 58). Only conduct whose harmful nature is easily identifiable, in the light of experience and economics, should be regarded as a restriction of competition by object (compare the Opinion of Advocate General Wahl in *CB* v *Commission*, cited above, point 56).

Third, the Court recalls that it is incumbent on ESA or the competent national competition authority to adduce evidence capable of proving the existence of the circumstances that constitute an infringement of Article 53 EEA. Keeping in mind the guarantees provided by Article 6(2) of the European Convention on Human Rights, it follows from the principle of the presumption of innocence that the undertakings to which the decision finding an infringement was addressed must be given the benefit of the doubt (see Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 93)."[45]

As to how to assess *whether joint bidding constitutes a bid rigging cartel or may be regarded as legitimate consortia arrangements or legitimate ancillary restraints*, the EFTA court stated:

"Second, as regards the economic and legal context of the submission of the joint bids, in particular the question whether the parties are actual or potential competitors, the Court observes that, according to paragraph 237 of the Horizontal Guidelines, a commercialisation 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. This applies in particular to consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually. Only if the parties are actual or potential competitors may the agreement be considered a restriction of competition by object (compare the judgments in *E.ON Ruhrgas* v *Commission*, T-360/09, EU:T:2012:332, paragraph 104; *Toshiba* v *Commission*, cited above, paragraphs 30 to 36; and *Lundbeck* v *Commission*, cited above, paragraph 437). This is because, if the parties are not competitors, their agreement cannot have any form of impact or effect on competition.

However, in the present case, according to the Supreme Court's request, Borgarting Court of Appeal found that Ski Taxi and Follo Taxi would have been able to submit individual bids in both tender procedures, and that they were thus competitors in both procedures. That finding is not challenged before the Supreme Court.

Third, on the question whether the submission of joint bids may be regarded as an ancillary restraint, the Court notes that an anti-competitive restriction may escape the prohibition laid down in Article 53(1) EEA because it is ancillary to a main operation that is not anti-competitive in nature. It is necessary to enquire whether that operation would be impossible to carry out in the absence of the restriction in question and whether that restriction is proportionate to the underlying objectives of the operation. The fact that that operation is simply more difficult

[45] Judgment of the EFTA Court in Case E-3-16, p. 14, paragraphs 60–62.

to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the "objective necessity" required for it to be classified as ancillary. This would undermine the effectiveness of the prohibition laid down in Article 53(1) EEA (compare the judgment in *MasterCard and Others* v *Commission*, cited above, paragraphs 91 and 107).

It is for the referring court to assess whether those conditions are met. At the hearing, the Appellants stated that the question whether the submission of joint bids by SFD was to be considered ancillary to the operation of the joint management company SFD was hypothetical and that they preferred to refrain from commenting on the matter. The Norwegian Government and the Commission, on the other hand, questioned whether the pooling of Ski Taxi's and Follo Taxi's administrative resources achieved through the creation and the operation of SFD required the cooperation on price, quality and capacity which the submission of joint bids implied.

Therefore, the answer to the third question is that, in order to determine whether the submission of joint bids through a joint management company reveals a sufficient degree of harm that it may be considered a restriction of competition by object, regard must be had to the substance of the cooperation, its objectives and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor.

Moreover, since the submission of joint bids involves price-fixing, which is expressly prohibited by Article 53(1) EEA, consideration of the economic and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. However, such an assessment needs to take into account, albeit in an abridged manner, whether the parties to an agreement are actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint."[46]

As to the issue *whether also open as opposed to secret joint bidding can constitute an infringement*, the EFTA court provided the following guidance:

"By its second question, the referring court asks whether it is relevant, in order to determine whether the submission of joint bids may be considered a restriction of competition by object, that the joint character of the bids was disclosed to the contracting authority. It is not disputed that the tenders clearly stated that the bids were submitted on behalf of Ski Taxi and Follo Taxi.

Disclosure to the contracting authority may be an indication that the parties did not intend to infringe the prohibition on agreements between undertakings. However, as mentioned above, although the parties' intention may be taken into account in order to determine whether an agreement may be considered a restriction of competition by object, it is not a necessary factor. As noted by the Commission, cooperation conducted publicly has been found to have an anti-competitive object (compare the judgment in *Beef Industry Development Society and Barry Brothers*, cited above, paragraph 10).

It is for the referring court to assess whether the fact that Ski Taxi and Follo Taxi disclosed the joint character of their bids to the contracting authority may support

[46] Judgment of the EFTA Court in Case E-3-16, p. 19–21, paragraphs 97–102.

a finding that their conduct cannot be considered a restriction of competition by object.

Therefore, the answer to the second question is that, while the disclosure of the joint nature of the bids to the contracting authority may be an indication that the parties did not intend to infringe the prohibition on agreements between undertakings, that, in itself, is not a prerequisite for determining whether an agreement may be considered a restriction of competition by object."[47]

2.3.2 The Finnish Taxi Case of 2004 – Finnish Supreme Administrative Court[48]

Under the English language version of its website, the Finnish Competition Authority[49] has published the following summary of an interesting early case on bid-rigging in the Finnish taxi industry, which reads as follows:

"The Finnish Supreme Administrative Court imposed on Kuopion Taksiautoilijat ry, the association of taxi drivers from the city of Kuopio, a competition infringement fine of 5,000 euros for forbidden cooperation regarding a tender arranged by the city of Kuopio. Authorised by its members, the association of taxi drivers from the city of Kuopio had made a joint bid for managing the city service. Due to the large number of members (93) behind the joint tender, few outside bids were obtained in the tender and they would not have been sufficient to manage the traffic which the tender concerned. The unlawful collaboration of the taxi drivers considerably weakened the possibilities of the city to obtain savings through the tender. The gravity of the infringement further increased because it involved statutory transports and the municipality could not withdraw from purchasing them even if it meant paying a higher price for them than what was the competed level.

Further, the Finnish Competition Authority had advised the taxi drivers how to avoid forbidden practices in the making of bids. The Supreme Administrative Court considered individual taxi drivers also to have carried out antitrust infringements, but rejected the Finnish Market Court's decision to impose fines on individual drivers due to the limited nature of the infringements."[50]

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47 Judgment of the EFTA Court in Case E-3-16, p. 19–21, paragraphs 105–108. The Norwegian Supreme Court then gave its judgment in this matter on 22 June 2017 (Case HR-2017-1229-A).

48 Decision of the Finnish Supreme Administrative Court of 14 September 2004 in Case dnro 325 ja 398/2/03), decision of the Finnish Market Court on 27 December 2002 in Case MD:s MAO:186/I/02).

49 Kilpailu- ja kuluttajavirasto (KKV) in Finnish, Konkurrensverket in Swedish.

50 Downloaded from the website of the Finnish Competition Authority on 13 October 2018, https://www.kkv.fi/sv/information-och-anvisningar/konkurrensarenden/konkurrensbegransningar/karteller-och-andra-horisontella-konkurrensbegransningar/anbudskarteller/.

2.3.3 *The Danish Road Construction Case of 2018 – Danish Maritime and Commercial High Court*[51]

In 2014, the Danish Road Directorate conducted a public procurement proceeding as to road marking to be conducted in three geographical districts in Denmark. The Danish undertakings Eurostar Danmark A/S and LKF Vejmarkering A/S (now GVCO A/S) submitted a joint offer for all of the three districts through an established bidding consortium, Dansk Vejmarkering Konsortium. The consortium won the entire tender having offered the lowest price. Subsequent to the complaint by another tenderer in the proceeding, the Danish Competition Authority started an investigation. In June 2015, the Danish Competition Council found that Eurostar Danmark A/S and LKF Vejmarkering A/S (below referred to as the Parties) had been competitors and that their joint bidding constituted a by object infringement of Danish and EU competition law. The Parties appealed the decision to the Danish Competition Appeals Tribunal, which on 11 April 2016 upheld the decision of the Danish Competition Council. Thereafter, the Parties appealed the decision of the Danish Competition Appeals Tribunal to the Danish Maritime and Commercial High Court.

In its judgment of 27 August 2018, the Danish Competition Appeals Tribunal to the Danish Maritime and Commercial High Court reached the opposite conclusion, annulling the decision of the Danish Competition Appeals Tribunal. From a Swedish perspective, the judgment of the Danish Maritime and Commercial High Court is a very long one – 359 pages, or 59 pages longer than a standard Swedish doctoral dissertation in law. However, fortunately, the legal reasoning of the Danish Maritime and Commercial High Court is rather short (3 pages) and very well-formulated, as follows from the following comprehensive quote:

> "*Legal analysis and conclusions of the Danish Maritime and Commercial High Court*
> In November 2010, the consultancy firm McKinsey prepared a report for how to optimize the value for contracting authorities to commission services in public procurement proceedings, to be used at a meeting of the Growth Forum 2009–2011 of the Danish Government. It follows from the report's recommendation number 8 that purchases should be concentrated to fewer suppliers, that measures should be taken to attract foreign suppliers and that procedures and requirements should be used in a way which promotes effective operations.
>
> As a result of this, the Danish Road Directorate changed its public procurement practice and actively tried to attract foreign tenderers by visits in Norway and in Sweden. The public procurement proceeding at hand was, so to reflect the recommendations of McKinsey in this regard, structured in such a way that it made it possible to tender for certain districts or as a common tender for all of the districts. However, a common tender for all districts required setting specific prices for each

[51] Judgment of the Danish Maritime and Commercial High Court in Joined Cases U-2-16 and U-3-16 of 27 August 2018.

district, but that it also was possible to offer a rebate – in this case without any ceiling – in case tenders were submitted for several or all of the districts. The Court therefore considers that the procurement model in itself provided incentives for suppliers to submit comprehensive tenders in accordance with McKinsey's recommendations, and that there was a realistic possibility that comprehensive tenders for all districts could be expected from foreign suppliers.

In the case at hand were there both tenders for parts of the procurement and one comprehensive tender from the Parties, which later turned out to be the only comprehensive bid. The comprehensive tender of the Parties included a rebate of 20 % if the Parties were to win all of the districts.

The fact that an undertaking, which wishes to submit a tender for the road marking procurement at hand, does not have capacity itself to tender for the entire procurement, while having the capacity to tender for certain districts, can in the view of the Court not prevent such an undertaking from entering into a consortium with a view to tender for all districts, as such a restriction not necessarily would increase competition. In this regard, it cannot matter that there was only one comprehensive tender, as this is part of an ex post assessment.

Decisive for assessing whether a consortium agreement can be presumed to constitute an infringement of Article 6 of the Danish Competition Act and Article 101 TFEU is if the tendering undertakings really lacked the capacity to submit tenders on their own for the comprehensive contract. The Parties have themselves submitted capacity calculations which show that they did not have this capacity, both as to sufficient staff and sufficient technical equipment.

It is up to the Competition Authorities to prove that the Parties' own capacity calculations are not correct. The assumption that Parties could have carried out the comprehensive contract on their own relies on the hypothetical assumption that it was possible to expand the amount of staff and technical equipment, and there is no evidence showing that this was possible or would have been justifiable from a commercial perspective.

Moreover, the Competition Authorities have objected to the Parties having been entitled to reserve capacity to existing core clients without being able to submit written project contracts in this regard. The Court finds that such a requirement is not justified, because it has to be legal for tendering undertakings, based on prior experience, to reserve capacity to clients which experience has shown to regularly purchase services from the Parties; from a commercial perspective it would be irresponsible not to be able to serve these clients and thus to lose the opportunity to obtain higher margins from other contracts.

Furthermore, the Court has noticed that the Danish Competition Appeals Tribunal assesses the character of the consortium agreement differently than the Danish Competition Council. **However, it is not apparent from the decision of the Danish Competition Appeals Tribunal whether the necessary concrete assessment of the object and the character of the agreement have been carried out for it to be possible to determine whether the agreement with a sufficiently high degree of clarity has the object to harm competition as to constitute an infringement of Article 6 of the Danish Competition Act or of Article 101 TFEU.**

> For these reasons, the Court annuls the decision of the Danish Competition Council of 24 June 2015 as upheld by the decision of the Danish Competition Appeals Tribunal on 11 April 2016."[52] (author's translation and emphasis)

This is truly one of the most interesting current Nordic cases on bid-rigging cartels.[53] The last word has not been spoken yet, as the judgment of the Danish Maritime and Commercial High Court has been appealed.

3. PUBLIC PROCUREMENT RELATED 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.[54] 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

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[52] Judgment of the Danish Maritime and Commercial High Court in Joined Cases U-2-16 and U-3-16 of 27 August 2018, p. 356–358.

[53] For a well-initiated analysis written by one of the attorneys acting in this case, Erik Kjaer-Hansen, as well as Josephine Alsling at the Danish law firm Gorrissen Federspiel, see the article "Maritime and Commercial High Court judgment on legality of consortium agreement" published on 13 September on the website of International Law Office, https://www.internationallawoffice.com/Newsletters/Competition-Antitrust/Denmark/Gorrissen-Federspiel/Maritime-and-Commercial-High-Court-judgment-on-legality-of-consortium-agreement; For another analysis, see the article "The Danish Maritime and Commercial High Court repeals a decision by the Danish Competition Appeals Tribunal by assistant attorney Kristine Langgaard Stage published on the website of the Danish law firm Kromann Reumert on 30 August 2018, https://en.kromannreumert.com/News/2018/08/The-Danish-Maritime-and-Commercial-High-Court-repeals-a-decision-by-the-Danish-Competition-Ap.

[54] 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).

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.

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.

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."[55]

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.[56]

[55] 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.

[56] 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

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 normally are entitled to obtain information from 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 clarifies 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."[57]

… 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.)

[57] 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.

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 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."[58]

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? To what extent may competition be distorted by undertakings having a right to obtain information on their competitors' tenders? These are issues which have been analysed in the author's earlier article on Public Procurement and Competition Law.[59]

This article will focus on one specific issue: When does the transfer of sensitive information from one potential supplier to another potential supplier before submitting tenders in a public procurement proceeding constitute an infringement by object?

3.1 Case law on public procurement related information exchange

In several of the cases concerning bid-rigging cartels and joint bidding discussed above, there has been connected information exchange, i.e. information exchange between the parties which has been connected or auxiliary to an overriding cooperation between the parties. However, there has been only

[58] 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.

[59] "Public Procurement and Competition Law From a Swedish Perspective – Some Proposals for Better Interaction" (2012) 15 *Europarättslig Tidskrift* 571–577.

one Swedish court case so far concerning pure information exchange related to a public procurement proceeding, the *Telia/GothNet* Data Communication Services Case of 2018, which will be analysed in the following subsection.

3.1.1 The Telia/GothNet Data Communication Services Case of 2018 – Swedish Patent and Market Court of Appeal[60]

In its judgment of 21 December 2016, the Swedish Patent and Market Court at the Stockholm District Court imposed fines on Göteborg Energi GothNet and TeliaSonera Sverige AB of 8 MSEK each for anti-competitive information exchange related to a public procurement proceeding. In 2009, the City of Gothenburg had conducted a public procurement proceeding concerning data communication services. The Swedish Patent and Market Court found that TeliaSonera had informed Göteborg Energi GothNet that it would not submit a tender on its own in the public procurement proceeding, while TeliaSonera conducted negotiations with the aim to become a subcontractor to Göteborg Energi GothNet.

One of the objections raised by the parties, was that Göteborg Energi GothNet had not taken this information into consideration when designing its tender. In this regard the Swedish Patent and Market Court reasoned as follows:[61]

> "*Evaluation and assessment of evidence*
> TeliaSonera's objection that it was not any longer present on the market relies on circumstances which the Swedish Patent and Market Court has dismissed, namely that TeliaSonera did not have the capacity and that the definition of the relevant market argued by the Swedish Competition Authority should be wrong. TeliaSonera thus remained on the market, as well as GothNet.
>
> Also unilateral disclosure of information to a competitor can constitute a concerted practice. Spreading sensitive information removes the uncertainty concerning a competitor's future actions and thus affects, directly or indirectly, the strategies adopted by the recipient of the information. (Comap, reference above).
>
> It is therefore GothNet and TeliaSonera which are to submit evidence showing that they have not acted with regard taken to the information obtained.
>
> Firstly, the objection that the information came in such a late phase that it lacked value, has to be dismissed. GothNets argument in this regard is based on the condition that the information was conveyed end of August 2009, whereas the Court has found that the information in reality was conveyed end June 2009 and thereafter was confirmed several times. Form end of June to the last day to submit a tender, the 25 August 2009, almost two months passed by. GothNet therefore had ample time to act on the basis of the information in question.

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[60] Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 761-17, *Telia*, on 13 February 2018.

[61] Judgment of the Swedish Patent and Market Court in Case PMT 17299-14, *Telia/GothNet*, on 21 December 2016. The author served as one of GothNet's legal advisors in this matter.

In order to rebut the presumtion that GothNet took the information in consideration when determining its market behaviour, GothNet needs to explain in a credible manner why the information lacked importance for its actions. The Court does not question that GothNet expected additional competing tenders while being eager to submit a competitive tender in order to keep the City of Gothenburg as its customer. However, what constitutes a competitive offer depends on how many suppliers participate in a public procurement proceeding and which market position these competitors have. As a consequence of the concerted practice, GothNet knew that the strongest competitor TeliaSonera would not participate, but instead had the ambition to function as GothNet's subcontractor. GothNet had incentives to adopt its tender to the information received.

In addition to this, GothNet did request the information to be confirmed, which TeliaSonera also did within the framework for those draft declarations of intent and cooperation agreements which were exchanged during summer 2009.

As already has been noted, TeliaSonera used the information in order to get a better position in the negotiations with Gothnet concerning a subcontractor agreement.

The presumption of a subsequent market behaviour therefore has not been rebutted."[62]

Another objection at issue was the assertion that TeliaSonera did not have the capacity to submit a tender of its own, meaning that TeliaSonera could not be regarded as a potential competitor to GothNet rendering competition law inapplicable. In this regard, the Swedish Patent and Market Court at the Stockholm District Court stated the following:

"*General considerations concerning the burden of proof and standard of proof concerning the capacity to submit a tender on its own etc.*

…The question arises how the burden of proof should be placed and what the standard of proof should be.

A possible way of placing the burden of proof would be, as in criminal cases, to place the burden of proof on the Swedish Competition Authority to refute such an objection and that the standard of proof is placed so that the Swedish Competition Authority have to submit so much evidence that the objection can be considered unfounded (see judgment of the Swedish Supreme Court in Case NJA 2009 p. 234). However, such a solution would not be suitable for reasons developed below. In view of what has been said above, guidance on the placement of the burden of proof should in the first place instead be taken from EU law.

As set out above, according to general principles of EU law, the presumption of innocence is applied in matters concerning the infringement of competition law applicable to undertakings and which can lead to fines or penalties being imposed. According to well-established case law in competition law cases, it is up to an undertaking which has been found to have acted in a way which normally constitutes an infringement, to submit evidence which prove the opposite. Such a rule does not reverse the burden of proof in an illicit way (Hüls, cited above, paragraph 155, also Montecatini, cited above, paragraph 18).

[62] Judgment of the Swedish Patent and Market Court in Case PMT 17299-14, *Telia/GothNet*, on 21 December 2016, p. 116–117.

> This case concerns an action not amenable to out-of-court settlement according to the Swedish Competition Act. **The Swedish Patent and Market Court Stockholm District Court considers that TeliaSonera has the burden of proof as to the assertion that it lacked the capacity to submit a tender.** If the burden of proof for such assertions is placed on the Swedish Competition Authority, it would become extremely difficult for the Authority to prove infringements, because an ex post analysis of the undertaking's supply capacity depends on a very thorough analysis of the concerned undertakings' internal operations, in a way which is difficult to achieve even with the far-reaching investigation powers entrusted on the Swedish Competition Authority. Moreover, the undertakings are free to submit new objections during the process, which is after the investigation has been concluded. It would therefore be inappropriate to place the burden of proof on the Swedish Competition Authority to refute the undertakings' objections. Instead, it is appropriate that the burden of proof for such an objection at hand in this case should instead be on the undertakings themselves in accordance with the principle according to which the burden of proof is to be placed on the party best placed to secure the evidence. The undertakings are indeed best placed to secure evidence themselves as to the lack of capacity to submit a tender on their own. The Stockholm District Court considers that the standard of proof for the undertakings to prove their objection should not be particularly high, it should be sufficient to prove to the standard of more likely than not."[63] (author's translation and emphasis)

While GothNet decided not to appeal the judgment, TeliaSonera appealed the judgment of the Swedish Patent and Market Court at the Stockholm District Court to the Swedish Patent and Market Court of Appeal. In its judgment of 13 February 2018, the Swedish Patent and Market Court of Appeal annulled the judgment of the Swedish Patent and Market Court. However, the issue of interest for the present article – whether the Swedish Competition Authority or the parties have the burden of proof for proving that the parties had the capacity, respectively not the capacity to submit tenders on their own – was not at all subject to analysis in the judgment of the Swedish Patent and Market Court of Appeal. The reason for this is that the Swedish Patent and Market Court of Appeal, following the path taken in the *Aleris Clinical Physiology Services Case* analysed above, ruled out that the cooperation could be regarded as an infringement by object irrespectively of whether there was a lack of capacity or not, by looking at the cooperation in its economic and legal context, as follows from the following quote:

> "The first part of the analysis is thus whether the practice at hand *prima facie* is of such a nature that it is capable of restricting competition. When carrying out this analysis, it should be borne in mind that the scope considering a cooperation to constitute a restriction by object is narrow.

[63] Judgment of the Swedish Patent and Market Court in Case PMT 17299-14 on 21 December 2016, p. 90–91.

In the case at hand, Telia's information meant that GothNet was informed that a potential buyer did not want to compete for the contract which was to be awarded to the supplier offering the lowest price.

Even if GothNet was uncertain as to how other potential competitors would act, the information from Telia was of such a nature that it *prima facie* was capable of restricting competition, even if it possibly was known that Telia rarely wins public procurement proceeding on the basis of the lowest price.

The next step in the assessment of whether a practice has the object to restrict competition is to take account of the legal and economic context in which the practice has taken place. However, this analysis must not become so comprehensive that it in reality turns into such an analysis which has to be carried out when assessing whether the practice has resulted in a restriction of competition.

The competition rules in the TFEU and the Swedish Competition Act aim at preventing behaviour and practices by undertakings on markets which otherwise are functioning and where the conditions for competition are not hampered by, e.g., public regulations (compare Article 1 of the Swedish Competition Act). It follows from the case law of the CJEU that if other legislation leads to a legal framework which makes it impossible for undertakings to act competitively, competition rules are not applicable at all. (See judgment of the CJEU of 11 November 1997 i Cases C-359/95 P and C-379/95 P, European Commission et al. v. Ladbrok Racing Ltd, EU:C:1997:531, paragraphs 33 and 34 together with the case law mentioned there as well as the judgment of the CJEU of 14 Octobre in Case C-280/08 P, Deutsche Telekom AG v. Europeiska kommissionen et al., EU:C:2010:603, paragraphs 80–82.)

The legal and economic background consists of a public procurement proceeding where the contracting authority, the City of Gothenburg, had included specific mandatory requirements. According to Telia's own assessment it would have been difficult for Telia to fulfill these requirements, both due to technical and business reasons. Also representatives for GothNet considered that it would have been difficult for Telia to win the procurement proceeding. The Swedish Patent and Market Court of Appeal finds that the requirements in the public procurement proceeding were designed in such a way that they made it highly difficult for Telia to effectively compete for the services in question, this applies in particular to the requirement to expand fiber connections to addresses where GothNet already had cable in place. Moreover, it follows from the evidence at hand in the case, *inter alia* from what witness D.G. has said, that it is difficult for undertakings not affiliated with the municipality to win a municipal public procurement proceeding concerning data communication where there already exists an installed municipal network.

In the case at hand, the legal framework surrounding the public procurement proceeding has not made it impossible to act competitively, which means that the competition rules are applicable in principle. **However, those conditions for effective competition which were in place in practice constitute a part of the factual conditions on the market and therefore are part of the economic and legal context which has to be taken into consideration when assessing whether there is an infringement by object. As stated above, the City of Gothenburg has by adopting the conditions in the procurement documents made it much more difficult for Telia to compete for the services in question. The City has therefore to a significant degree hampered the conditions for effective competition in the public procurement proceeding.**

As a result of this assessment and with regard to the narrow scope the notion of object has according to Article 101.1 TFEU and in the case law of the CJEU, the Stockholm District Court finds that Telia's transfer of information to GothNet cannot be regarded as having had the object to restrict competition, because competition was restricted by the requirements in the public procurement proceeding. Therefore, Telia cannot be regarded as having infringed Chapter 2, Article 1 of the Swedish Competition Authority or Article 101.1 TFEU without the need to carry out a closer assessment of the practice's potential effects on competition.

No other assessment is possible when applying the corresponding rules in the Swedish Competition Act. It is therefore necessary to assess whether the transfer of information resulted in a restriction of competition."[64] (author's translation and emphasis)

4. INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND COMPETITION LAW

The relevant provisions of the European Convention on Human Rights are as follows:

Article 6 – Right to a fair trial

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[64] Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 761-17 on 13 February 2018, *Telia*, p. 11–13.

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."[65] (emphasis added)

Article 7 – No punishment without law
"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."[66]

4.1 Case law on the European Convention on Human Rights and competition law

4.1.1 The Menarini Case of 2011 – European Court of Human Rights[67]

In April 2003, the Italian Competition Authority had imposed a fine of 6 million euro on the Italian pharmaceutical company Menarini for price fixing and market sharing on the Italian market for diabetes diagnosis testing. All of Menarini's appeals before Italian courts were dismissed. Thereafter, Menarini submitted a complaint to the European Court on Human Rights, stating that Italy had breached Article 6 of the European Convention on Human Rights. Menarini argued that the fine for breach of competition law, even though of administrative and not criminal nature under domestic Italian law, constituted a criminal sanction in the meaning of the European Convention on Human Rights. Menarini therefore argued that the fact that the Italian court review of the fining decision of the Italian Competition Authority was limited to verifying the legality of the decision meant that Menarini had not been offered access to an Italian court with full jurisdiction over the case, infringing Article 6 of the European Convention on Human Rights.

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[65] For a general analysis of Article 6 of the European Convention on Human Rights, see Ehrenkrona, Carl Henrik, *Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna – En kommentar*, Sthlm 2016, p. 73 ff. For a competition law specific analysis of the burden of proof, see the doctoral thesis *Legitimacy in EC Cartel Control* presented by Ingeborg Simonsson at the Stockholm University (in particular, see p. 258 ff.), the author of this article had the opportunity to be present at the disputation on 30 April 2009. See also the doctoral thesis *Dawn Raids under Challenge – A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* presented by Helene Andersson at Stockholm University, (in particular, p. 128), the author of this article had the opportunity to be present at the disputation on 3 February 2017.

[66] For an analysis of the implications of Article 7 of the European Convention of Human Rights, see https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf published by the European Court of Human Rights on 30 April 2018.

[67] Judgment of the European Court of Human Rights on 27 September 2011 in Case 43509/08, *Menarini*.

In this landmark judgment, the European Court of Human Rights ruled that the fine for breach of competition law was of a criminal law nature, with particular regard to its severity (6 million euro).[68]

4.1.2 The Hüls Case of 1999 – CJEU[69]

On 23 April 1986, the European Commission imposed a fine of ECU 2 750 00 on Hüls AG for participating in a concerted practice originating in mid-1977 by which the producers supplying polypropylene had, *inter alia*, contacted each other and met regularly in a series of secret meetings so as to discuss and determine their commercial policies. Hüls appealed the decision of the European Commission to the Court of First Instance which upheld the findings of the Commission as to the infringements of competition law, while reducing the fines owing to finding a shorter duration of the infringements. Hüls then appealed the judgment of the Court of First Instance to the CJEU.

Before the CJEU, Hüls argued as follows as to the burden of proof and the presumption of innocence:

> "Hüls concludes that the Court of First Instance, in breach of the principles of Community law relating to the degree of proof required and the assessment of evidence, found, on the basis of inconsistent facts, that it had participated in regular meetings since 1978–1979, whilst proof of that participation had been adduced for only one meeting in 1981 and then for 1982–1983. Furthermore, even for the period 1981–1983, the Court of First Instance could only have arrived at a finding that Hüls had participated in meetings with the intention of fixing prices and sales volumes by disregarding the principles relating to the burden of proof. At paragraph 126, the Court of First Instance required Hüls to adduce proof that it was not guilty, contrary to the presumption of innocence. That was incompatible with the principles of Community law. The burden of proof lay not on Hüls but on the Commission. Hüls's non-participation in meetings was, after all, a negative fact which it could not prove."[70]

The European Commission, argued as follows as to the burden of proof and the presumption of innocence:

> "According to the Commission, it is not true that the information provided by ICI concerning Hüls's participation in meetings from the end of 1978 or the beginning of 1979 was the sole item of evidence. Rather, it should be viewed in conjunction, in particular, with the table fixing quotas for 1979, referred to in paragraph 115 of

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[68] Judgment of the European Court of Human Rights on 27 September 2011 in Case 43509/08, *Menarini*, paragraph 42, which reads as follows: "A la lumière de ce qui précède et compte tenu du montant élevé de l'amende infligée, la Cour estime que la sanction relève, par sa sévérité, de la matière pénale".

[69] Judgment of the CJEU on 8 July 1999 in Case C-199/92 P, *Hüls*.

[70] Judgment of the CJEU on 8 July 1999 in Case C-199/92 P, *Hüls*, paragraph 146.

the contested judgment, which showed a quota for Hüls based on data that could only have come from Hüls.

The Commission also points out that the Court of First Instance did not require Hüls to establish its innocence, but merely indicated that there was not sufficient evidence to justify unusual conduct on the part of Hüls, which claimed that it had taken part in meetings without any intention of associating itself with anti-competitive actions which were agreed on at the meetings. Paragraphs 116 and 117 of the contested judgment showed, moreover, that because of the way Hüls had conducted itself, the Court of First Instance attached less weight to its assertions than it did to the evidence on which the Commission had based its decision. The Court of First Instance did not therefore commit any infringement of law and certainly not any breach of the presumption of innocence within the meaning of Article 6 of the ECHR."[71]

The CJEU stated the following as to the application of the *presumption of innocence embodied in Article 6.2 of the European Convention on Human Rights:*

"The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order (see, to that effect, Bosman, cited above, paragraph 79).

It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, Öztürk, Series A No 73, and of 25 August 1987 Lutz, Series A No 123-A)."[72]

The CJEU then stated that it *may be compatible with the presumption of innocence to reverse the burden of proof once the Commission had proven that Hüls had participated in meetings of a "manifestly anti-competitive nature":*

"Fourthly, it must be borne in mind that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Baustahlgewebe v Commission, cited above, paragraph 58).

However, since the Commission was able to establish that Hüls had participated in meetings between undertakings of a *manifestly* anti-competitive nature, it was for Hüls to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. The Court of First Instance did

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[71] Judgment of the CJEU on 8 July 1999 in Case C-199/92 P, *Hüls*, paragraph 147–148.
[72] Judgment of the CJEU on 8 July 1999 in Case C-199/92 P, *Hüls*, paragraph 149–150.

not therefore improperly reverse the burden of proof in paragraph 126 of the contested judgment."[73] (author's translation and emphasis)

4.1.3 The Montecatini Case of 1999 – CJEU[74]

On 23 April 1986, the European Commission imposed a fine of ECU 11 000 000 on Montecatini SpA (formerly Montedison SpA, then Montepolimeri SpA, then Monedipe SpA, below referred to as Monte) for participating in a concerted practice originating in mid-1977 by which the producers supplying polypropylene had, inter alia, contacted each other and met regularly in a series of secret meetings so as to discuss and determine their commercial policies. The Montecatini Case is thus based on the same polypropylene decision as the Hüls Case set out above. As Hüls, Monte appealed the decision of the European Commission to the Court of First Instance which upheld the findings of the Commission as to the infringements of competition law. Monte then appealed the judgment of the Court of First Instance to the CJEU. It should be noted that the CJEU gave its judgment in the Montecatini Case on the same day as in the Hüls Case – 8 July 1999 – and that the CJEU consisted of the same judges in both cases. It should therefore come as no surprise that the approach taken by CJEU in the Montecatini Case as to the *presumption of innocence embodied in Article 6.2 of the European Convention on Human Rights* is very close to that taken by the CJEU in the Hüls Case, as follows from the following quote from the judgment:

> "The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, cited above in paragraph 137, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.
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> It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, Öztürk, Series A No 73, and of 25 August 1987 Lutz, Series A No 123-A).
>
> On the question whether Monte's complaints are well founded, it must be pointed out, first, that Monte did not deny, before the Court of First Instance, having taken part in the meetings referred to in the Polypropylene Decision, but maintained that those meetings were not of the kind and scope described in that decision.
>
> In those circumstances, the Court of First Instance was entitled to consider that Monte did not dispute the fact that it had taken part in the meetings in question, without thereby distorting Monte's statements.

[73] Judgment of the CJEU on 8 July 1999 in Case C-199/92 P, *Hüls*, paragraph 154–155.
[74] Judgment of the CJEU on 8 July 1999 in Case C-235/92 P, *Montecatini*.

Secondly, it must be borne in mind that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Baustahlgewebe v Commission, cited above, paragraph 58).

Contrary to Monte's allegations, the Court of First Instance did not rely on presumptions for the purpose of establishing the anti-competitive character of the meetings in question, but on the evidence mentioned in paragraphs 83 to 85 of the contested judgment. Its assessment of that evidence cannot be questioned in an appeal.

Since, according to the findings of the Court of First Instance, the Commission had been able to establish that Monte had taken part in meetings between undertakings of a manifestly anti-competitive nature, the Court of First Instance was entitled to consider that it was for Monte to provide another explanation of the tenor of those meetings. It follows that the Court of First Instance did not unduly reverse the burden of proof and did not set aside the presumption of innocence."[75]

4.1.4 The TeliaSonera Case of 2013 – Swedish Market Court[76]

The Stockholm District Court had on 2 December 2011 imposed a high fine for abuse of a dominant position by way of margin squeeze related to ADSL services.[77]

In its judgment of 12 April 2013, the Swedish Market Court carried out its most comprehensive analysis ever of the conditions for applying the European Convention on Human Rights in cases concerning fines for breach of competition law, by stating the following:

"*Burden of proof and standard of proof*

Cases concerning fines for breach of competition law haven since 1 Juli 1993 been handled in accordance with the rules laid out in the Swedish Code of Legal Procedure for actions not amenable to out-of-court settlements. The *travaux préparatoires* on which the rules on applicable procedural rules are based do not really contain any reasons for why the rules for actions not amenable to out-of-court settlements should be applicable (compare SOU 1991:59, DS 1992:18 and prop. 1992/93:56). However, the overriding reason for this must have been that competition law concerns such interests which are important both for society as a whole and for the individual. An aspect of particular importance for the individual is that cases concerning fines for breach of competition law involves the application of a sanction of public law which can affect an individual in a very significant way.

Another aspect put forward on different occasions is that cases concerning fines for breach of competition law constitutes an accusation of a criminal offence in

[75] Judgment of the CJEU on 8 July 1999 in Case C-235/92 P, *Montecatini*, paragraphs 175–181.

[76] Judgment of the Swedish Market Court in Case MD 2013:5, *TeliaSonera*, of 12 April 2013.

[77] Judgment of the Stockholm District Court in Case T 31862-04, *TeliaSonera*, of 2 December 2011.

accordance with Article 6.2 of the European Convention on Human Rights and that the principle of presumption of innocence thus is applicable (see e.g. SOU 2006:99 p. 243 f. and prop. 2007/08:135 p. 84 and 107 with references). Moreover, the European Court of Human Rights has found that a decision by the Italian Competition Authority to impose an administrative fine for breach of the Italian competition rules involved an accusation of a criminal offence (see the European Court of Human Right's judgment on 27 September 2011 in Case A. Menarini Diagnostics S.L.R v. Italy).

Moreover, the CJEU as well as the Tribunal have in cases concerning e.g. concerted practices stated that the principle of presumption of innocence is applicable in cases concerning breaches of competition law where fines or penalties may be imposed on undertakings, e.g. in view of the severeness of the sanction which may be applied (see e.g. the judgment of the CJEU in Case C-89/11 P, E.ON v. Commission, paragraphs 51–52, C-199/92, Hüls v. Commission, paragraphs 149–150, and C-235/92, Montecatini v. Commission, paragraphs 175–176, as well as the judgment of the Tribunal in Case T-336/07, Telefónica, SA och Telefónica de España, SA v. Commission, paragraph 73).

The fact that competition cases are handled in accordance with the rules applicable to actions not amenable to out-of-court settlements means e.g. that the court *ex officio* can request evidence in accordance with Chapter 35, Article. 6 second sentence of the Swedish Code of Legal Procedure. However, the point of departure is that it is the parties' responsibility to submit evidence also in actions not amenable to out-of-court settlements. According to well-established case law in cases concerning abuse of a dominant position, the Swedish Competition Authority has the burden of proof for proving such circumstances which constitute an abuse of a dominant position, and if the case concerns a request for fines also to prove those circumstances which are relevant for the size of the fine.

The Swedish Market Court has in earlier judgments found that there must be high requirements as to the strength of evidence in cases concerning fines for breach of competition law, and has also stated that such fines constitute a sanction of public law (see judgment of the Swedish Market Court in Case MD 2005:7 with references to national and EU case law).

Since then, the case law of the European Court of Humans Rights has confirmed that an administrative fine can involve an accusation of a criminal offence. When assessing the requirements on the strength of the evidence account has therefore to be taken of the principle of presumption of innocence. Moreover, it should be taken into account that there are effective ways for assuring a sustainable enquiry in such cases."[78] (author's translation and emphasis)

The Swedish Market Court thus found that "the case law of the European Court of Humans Rights has confirmed that an administrative fine can involve an accusation of a criminal offence". This means that it was on 12 April 2013 that the Swedish Market Court for the first time ever explicitly stated that the presumption of innocence according to Article 6.2 of the European Convention of

[78] Judgment of the Swedish Market Court of 12 April 2013 in Case MD 2013:5, *TeliaSonera AB* v. *Swedish Competition Authority*, p. 34–35, paragraphs 160–165. For a commentary of this judgment, see Karlsson, Johan, and Östman, Marie, *Konkurrensrätt – En handbok*, 5th edition, Sthlm 2014, footnote 49 on p. 1181.

Human Rights fully applies in cases concerning fines for breach of competition law.

In accordance with the requirement to respect the principle of innocence set out in Article 6.2 of the European Convention on Human Rights, the Swedish Market Court developed the following specific requirements on the evidence to be presented in a case concerning a fine for abuse of a dominant position:

> **"In cases concerning the abuse of a dominant position which include a request to impose a fine, the point of departure must therefore be that the Swedish Competition Authority presents evidence which is robust in the meaning that there is no known additional evidence which could have affected the value of the evidence (compare Ekelöf et al., p. 187 f.). Moreover, the Swedish Competition Authority must prove both those circumstances which constitute an abuse of a dominant position as well as those circumstances which are relevant for the size of the fine."**[79] (author's translation and emphasis)

4.1.5 The Swedavia Case of 2015 – Swedish Market Court

The Swedish Market Court had on 23 November 2011 given judgment in Case MD 2011:28, whereby Swedavia as requested by the plaintiff Uppsala Taxi 100 000 AB was obliged to cease demanding an extra sign fee for high level service, under threat of a penalty amounting to two million SEK. Thereafter, the Swedish Competition Authority had sued Swedavia before the Stockholm District Court requesting fines for abuse of a dominant position.

Swedavia had before the Stockholm District Court requested that the action should be rejected because on procedural grounds, as Swedavia by way of injunction decision under threat of penalty payments had been subject to a court procedure concerning those actions the case of the Swedish Competition Authority was based on (a so called Ne bis in idem objection). The Stockholm District Court dismissed Swedavia's request. Swedavia then appealed to the Swedish Market Court, which in its judgment first clearly stated that the Swedish Competition Authority's action for fines for breach of competition law is of a criminal law character according to the European Convention on Human Rights:

> "The Swedish Market Court has earlier, referring to the case law of the European Court of Human Rights, respectively the CJEU, found that cases concerning fines for breach of competition law constitutes an accusation of a criminal offence and therefore are of a criminal law character (see the judgment of the Swedish Market Court in Case MD 2013:5, paragraphs 160 f., the judgment of the European Court of Human Rights in Case 43509/08 A. Menarini Diagnostics S.L.R v. Italy and the judgment of the CJEU in Case C-501/11 P, Schindler Holding Ltd et al. v. Com-

[79] Judgment of the Swedish Market Court of 12 April 2013 in Case MD 2013:5, *TeliaSonera AB* v. *Swedish Competition Authority*, p. 34–35, paragraph 165.

> mission, paragraphs 30–38). The request for fines for breach of competition law submitted by the Swedish Competition Authority in the present case is therefore, as found by the Stockholm District Court of a criminal law character."[80]

An issue in the case was whether the provisions in the Swedish Competition Act fulfill the requirement of foreseeability which follows from the principle of legality according to Article 7 of the European Convention on Human Rights.

The provision in question (Chapter 3, Article 7 of the Swedish Competition Act reads as follows:

> "An administrative fine may not be imposed 1. in respect of measures taken in compliance with a decision pursuant to Article 1, 2 or 3, a prohibition pursuant to Article 27 or 30 issued under penalty of a fine in accordance with the provisions of this Act".

The Swedish Market Court interpreted the provision in such a way that it is compatible with chapter 3, Article 7.1 to impose a fine for abuse of a dominant position although the abuse previously has been subject to an injunction under threat of penalty payment as long as the fine only relates to the time period until the injunction decision to cease the abuse was taken.

The next issue which the Swedish Market Court thereafter had to address was whether the interpretation made by the Swedish Market Court was sufficiently foreseeable for Swedavia for it to be compatible with the principle of legality according to Article 7 in the European Convention on Human Rights to impose a sanction of criminal law character.

This is the first time ever that the Swedish Market Court had the opportunity to apply the requirement of foreseeability stemming from the principle of legality in a competition law case. The general part of the in-depth legal analysis of the Swedish Market Court reads as follows:

> "*The principle of legality*
> A prerequisite for the exercise of public power is according to chapter 1, Article 1.3 of the Swedish Constitutional Instrument of Government that it is exercised under the rule of law. This is the constitutional basis for the principle of legality (compare Anders Eka et al., *Regeringsformen – med kommentarer* – p. 24). The principle of legality is thus applicable to all exercise of public power, but it is particularly important within criminal law (Petter Asp et al., *Kriminalrättens grunder*, second edition p. 45 f. and Fredrik Sterzel, *Legalitetsprincipen*, published in Offentligrättsliga principer, edited by Lena Marcusson, second edition. p. 73 f.). The requirement to respect the principle of legality which is applied within criminal law must also be applied with regard to fines which according to the European Convention of Human Rights are of a criminal law character (see judgment of the Swedish Supreme Court in Case NJA 2013 p. 842, paragraph 21 f.).

[80] Decision of the Swedish Market Court on 17 April 2015 in Case MD 2015:4, *Swedavia AB* v. *Swedish Competition Authority*, p. 6, paragraph 25.

> The standing of the principle of legality within criminal law follows from Chapter 2, Article 1 of the Swedish Criminal Code. …The principle of legality constitutes a guarantee for legal certainty as everyone shall be able to foresee when and to a certain degree how they may become subject to actions based on criminal law (Petter Asp et al. p. 46). Within criminal law, the principle of legality consists of four requirements which apply to both legislation and jurisprudence, namely the requirement that there should be no crime without law, the prohibition against retrospective legislation, the prohibition against an analogical interpretation of criminal law and the prohibition of criminal law which is not clear and precise. The question at hand in the present case is whether the provisions in Chapter 3, Article 7.1 of the Swedish Competition Act conflicts with the prohibition of criminal law which is not clear and precise.
>
> **It follows from the prohibition of criminal law which is not clear and precise that there is a requirement as to clarity and precision. However, there is nothing to prevent that a certain provision is interpreted according to well-established principles. However, such an interpretation must be done with caution and an interpretation which has become generally accepted should not be changed without very good reasons** (see the judgment of the Swedish Supreme Court in Case NJA 1994 p. 480). **The requirement of clarity of the principle of legality shall normally be regarded as fulfilled when a person may obtain information of which action or which failure to act may lead to liability from the wording of a provision and, if applicable, assisted by the interpretation made by the courts** (see the judgment of the Swedish Supreme Court in Case NJA 2013 p. 842, paragraph 22, with references to the case law of the European Court of Human Rights).[81]

4.1.6 The Kezban Case of 2013 – Swedish Supreme Court[82]

This case concerns an environmental sanction charge of 5 000 SEK, which was imposed on the undertaking Kezban i Göteborg AB. The undertaking argued that the charge had been imposed based on provisions where the application made by the competent authority in the case had not been foreseeable. Kezban argued, *inter alia*, that the environmental sanction charge of 5 000 SEK constituted an accusation of a criminal offence in the meaning of the European Convention on Human Rights and was imposed contrary to the principle of legality embodied in Article 7 of the Convention.

In its judgment of 18 October 2013, the Swedish Supreme Court stated the following as to the practical implications of environmental sanction charges being classified as a criminal offence in the meaning of the European Convention on Human Rights:

[81] Decision of the Swedish Market Court on 17 April 2015 in Case MD 2015:4, *Swedavia* v. *Swedish Competition Authority*, p. 8–9, paragraphs 31–33.

[82] Judgment of the Swedish Supreme Court on 18 October 2013 in Case NJA 2013 p. 842, *Kezban i Göteborg*.

> "Environmental sanction charges are to be regarded as a criminal sanction in the meaning of the European Convention of Human Rights (see judgment of the Swedish Supreme Court in Case NJA 2004 s. 840 I och II). This does not mean that the domestic requirements set out in criminal procedural law are directly applicable. But it means that the guarantees of legal certainty which are accorded to individuals by the European Convention on Human Rights are applicable. This entails in certain aspects higher requirements on the handling of a case than stipulated by the Swedish Act (1971:291) on administrative procedure which otherwise was applicable to the procedure before the environmental court."[83]

As to the *practical implications of the principle of legality embodied in Article 7 of the European Convention on Human Rights*, the Swedish Supreme Court stated the following:

> In order to impose a fine like the one at hand the strict requirement of legal basis applies, stemming from the principle of legality stipulated in Article 7 of the European Convention on Human Rights. These requirements can be regarded as fulfilled as to the requirements of legal certainty which apply according the domestic criminal law, which means that the same requirements as to clear and precise legislation which is applicable within the domestic criminal law shall apply also to fines which in the meaning of the European Convention on Human Rights constitute a criminal sanction (compare, e.g., the judgments of the Swedish Supreme Court in Case NJA 2000 p. 490 and Case NJA 2008 p. 946).
>
> **The requirement of clarity embodied in the principle of legality shall normally be considered fulfilled when a person can deduce from the wording of the provision and, if applicable, with assistance from the interpretation made by the courts, which actions or failure to act can entail responsibility according to the provision in question** (see se *Kokkinakis* v Greece (no. 14307/88 judgment of 25 May 1993, § 52), *Coëme* et al. v *Belgium* (no. 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, 22 June 2000, § 145) as well as Hans Danelius, *Mänskliga rättigheter i europeisk praxis*, 4th edition 2012, p. 342 f.)."[84] (author's translation and emphasis)

5. THE CARTES BANCAIRES CASE

A fundamental question of competition law is whether the notion of infringement by object should be given a broad interpretation or should be interpreted restrictively. The landmark judgment in this regard is the judgment of the CJEU on 11 September 2014 in *Cartes Bancaires*, where the CJEU ruled that the notion of infringement by object must be interpreted restrictively, as follows:

> "Secondly, in the light of that case-law, the General Court erred in finding, in paragraph 124 of the judgment under appeal, and then in paragraph 146 of that judg-

[83] Judgment of the Swedish Supreme Court on 18 October 2013 in Case NJA 2013 p. 842, *Kezban i Göteborg*, paragraph 20.

[84] Judgment of the Swedish Supreme Court on 18 October 2013 in Case NJA 2013 p. 842, *Kezban i Göteborg*, paragraphs 21–22.

ment, that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. **The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.** The fact that the types of agreements covered by Article 81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant."[85] (author's translation and emphasis)

The practical question, then, is how to make the legal assessment in practice, when determining whether a certain agreement has an anti-competitive object or not. In this regard, valuable guidance is provided by Advocate General Nils Wahl (who is also a professor in competition law at the Stockholm University) in his Opinion in the *Cartes Bancaires* Case delivered in March 2014:

"Considering an agreement or a practice to restrict competition on account of its very object has significant consequences, at least two of which should be highlighted.

First of all, the method of identifying an 'anti-competitive object' is based on a formalist approach which is not without danger from the point of view of the protection of the general interests pursued by the rules on competition in the Treaty. Where it is established that an agreement has an object that is restrictive of competition, the ensuing prohibition has a very broad scope, that it is to say it can be imposed as a precautionary measure and thus jeopardise future contacts, irrespective of the evaluation of the effects actually produced.

This formalist approach is thus conceivable only in the case of (i) conduct entailing an inherent risk of a particularly serious harmful effect or (ii) conduct in respect of which it can be concluded that the unfavourable effects on competition outweigh the pro-competitive effects. To hold otherwise would effectively deny that some actions of economic operators may produce beneficial externalities from the point of view of competition. In my view, it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy.

Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition.

Second, such classification relieves the enforcement authority of the responsibility for proving the anti-competitive effects of the agreement or the practice in question. **An uncontrolled extension of conduct covered by restrictions by object is dangerous having regard to the principles which must govern evidence and the burden of proof in relation to anti-competitive conduct.**

Because of these consequences, classification as an agreement which is restrictive by object must necessarily be circumscribed and ultimately apply only to an agree-

[85] Judgment of the CJEU of 11 September 2014 in Case C-67/13 P *Cartes Bancaires*, para. 58.

ment which inherently presents a degree of harm. This concept should relate only to agreements which inherently, that is to say without the need to evaluate their actual or potential effects, have a degree of seriousness or harm such that their negative impact on competition seems highly likely. Notwithstanding the open nature of the list of conduct which can be regarded as restrictive by virtue of its object, I propose that a relatively cautious attitude should be maintained in determining a restriction of competition by object."[86] (author's emphasis)

6. THE ALFA QUALITY MOVING CASE

6.1 The facts of the case

On 14 July 2014, the Swedish Competition Authority sued the leading Swedish international relocation services company Alfa Quality Moving AB[87] as well NFB Transport Systems AB and ICM Kungsholms AB before the Stockholm District Court for anti-competitive cooperation related to two mergers, requesting high fines. While the facts of the case have nothing in common with the subject of the present article – bid-rigging and public procurement related information exchange – the reasoning of the courts concerning the burden of proof in this case are, as will be set out below, also very relevant indeed as to the issue of burden of proof in cases concerning bid-rigging and public procurement related information exchange.

The facts of the Alfa Quality Moving Case are in brief as follows. In December 2006, Alfa Quality Moving purchased the international relocation services operations from NFB Transport Systems. Five years later, in 2011, Alfa Quality Moving purchased the international relocation services operations from ICM Kungsholms AB. In both cases, the acquisition agreements contained a non-compete clause, according to which the seller undertook to refrain from competition with the buyer on the market for international relocation services for a period of five years.

It turned out that the Swedish Competition Authority did not in fact question that the non-compete clauses were directly related to the mergers or that non-compete clauses were necessary for the transactions to occur. The only litigious issue was the duration of the non-compete clauses, where the Swedish Competition considered that two years was the maximum duration to be legal under competition law, whereas the undertakings argued that five years was a proportionate duration for the non-compete clauses to be considered ancillary to the transactions and as such legal under competition law. Moreover, the par-

[86] Opinion of Advocate General Nils Wahl in Case C-67/13 P, *Cartes Bancaires*, of 27 March 2014, paragraphs 53–58.

[87] The author has served as lead counsel to Alfa Quality Moving during the approximately 5 years it took to handle this case at the Swedish Competition Authority, the Stockholm District Court and finally the Swedish Patent and Market Court of Appeal.

ties had different views as to the placement of the burden of proof. The Swedish Competition Authority argued that the undertakings had the burden to proof that a duration longer than two years for the non-compete clauses was proportionate, while the undertakings considered that, in view of the presumption of innocence, the Swedish Competition Authority had the full burden of proof.

There is no guidance form the European Commission as how to treat ancillary restraints related to mergers which are below the EU-thresholds for notifying a merger to the European Commission. However, the European Commission has issued such guidance as to mergers where the very high EU-thresholds are fulfilled. The relevant provisions of the Commission's Notice on Ancillary Restrainsts read as follows:

> "Non-competition obligations which are imposed on the vendor in the context of the transfer of an undertaking or of part of it can be directly related and necessary to the implementation of the concentration. In order to obtain the full value of the assets transferred, the purchaser must be able to benefit from some protection against competition from the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such non-competition clauses guarantee the transfer to the purchaser of the full value of the assets transferred, which in general include both physical assets and intangible assets, such as the goodwill accumulated or the know-how developed by the vendor. These are not only directly related to the concentration but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the undertaking or of part of it could not be accomplished.
>
> However, such non-competition clauses are only justified by the legitimate objective of implementing the concentration when their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve that end.
>
> Non-competition clauses are justified for periods of up to three years when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how. When only goodwill is included, they are justified for periods of up to two years."[88]

Moroever, the Commission's Notice on Ancillary restraints provides a number of examples of exceptional cases in which longer periods may be justified.[89]

6.2 Judgment of the Stockholm District Court

In its judgment on 15 May 2016, the Stockholm District Court dismissed the case brought by the Swedish Competition Authority, finding that the Swedish Competition Authority had neither proven that the non-compete clauses had

[88] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03), paragraphs 18–20.

[89] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03), footnote 5 on p. 27.

an anti-competitive object nor proven that they had anti-competitive effects. The reasons for reaching this conclusion are outside the scope of the present article. What is interesting for the present article on bid-rigging and public procurement is the fact that the Stockholm District Court placed the burden of proof on the undertakings to prove that a duration of more than 2 years was proportionate. The Stockholm District Court then found that the parties had proven that a duration of three years was proportionate, but failed to prove that more than three years was proportionate, which meant that the Stockholm District Court ruled that the non-compete clauses were not to be regarded as ancillary during the laws two years of the five years duration. What is of interest for the sake of the present article is the general reasoning of the Stockholm District as to the burden of proof in cases concerning sanctions for breach of competition law, which reads as follows:

> "*Issues related to evidence and burden of proof*
> In cases concerning fines for breach of competition law, which is an action not amenable to out-of-court settlement, the Swedish Competition Authority has the burden of proof both for the circumstances which constitute an infringement as well as for those circumstances which are relevant for the size of the fine (Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and, e.g. the judgment of the Swedish Market Court in Case MD 2013:5).
>
> The Swedish Competition Authority has the burden of proof and must present evidence which is robust in the meaning that there is no known additional evidence which could have affected the value of the evidence (see the judgment of the Swedish Market Court in Case MD 2013:5, paragraphs 160–165 and references made there to case law from the European Court of Human Rights and the CJEU stating that infringements of competition law where fines or penalty payments may be imposed constitute an accusation of a criminal offence, which is why the principle of presumption of innocence is applicable in such cases.
>
> The one which invokes the exemption provisions embodied in Chapter 2, Article 2 of the Swedish Competition Act or Article 101.3 TFEU has the burden of proof that the conditions for applying these provisions are fulfilled.
>
> According to case law, in competition law cases it is up to an undertaking, which has been shown to have acted in a way which normally constitutes an infringement, to submit circumstances which prove the opposite. This applies, *inter alia*, to undertakings which invoke objectively justified reasons in cases concerning the abuse of a dominant position in chapter 2, article 7 of the Swedish Competition Act and Article 102 TFEU. Such a rule has not been considered an illicit way for the court to reverse the burden of proof. (See Case C-199/92 P Hüls, paragraph 155).
>
> The Stockholm District Court considers that the question whether a non-compete clause constitutes an ancillary restraint has to be considered as a defense in a situation where an undertaking has been shown to have acted in a way which constitutes an infringement (even if the parties have treated this as the first part of the legal assessment to be carried out by the Court in this matter). This is this order which the Commission seems to follow (see, e.g., the Commission's decision in Case AT.39839 Telefónica, paragraph 6.5, appealed to the Tribunal) and such a view is supported in the literature (Wish & Bailey, Competition Law, 8th edition, p. 264).

> The overall conclusion, therefore, is that the Swedish Competition Authority has the burden of proof to prove that the defendants have infringed the competition rules by way of anti-competitive cooperation. However, **the Stockholm District Court considers that the defending undertakings have the burden of proof to prove that the non-compete clauses have been ancillary to the mergers during those time periods which are at hand in the case** (which as always can be refuted by the Swedish Competition Authority)."[90]

6.3 Alfa Quality Moving's legal arguments as to the *Cartes Bancaires* judgment and the presumption of innocence under the European Convention on Human Rights

The Swedish Competition Authority appealed the judgment of the Stockholm District Court to the Swedish Market Court which in September 2016 became the new Swedish Patent and Market Court of Appeal. The Swedish Competition Authority chose to withdraw one of its claims in the appeal procedure and no longer argued that the non-compete clauses had anti-competitive effects. This means that the only question left for the Swedish Patent and Market Court of Appeal to decide was whether a duration of five years entails that a unilateral non-compete clause, which protects the buyer from re-entering the market in question, becomes an infringement by object.

As to the significance of the landmark *Cartes Bancaires* judgment of the CJEU, Alfa Quality Moving argued as follows before the Swedish Patent and Market Court:

> "The interesting question of law in this case is whether a longer duration than two years for a *unilateral non-compete clause to protect the buyer* of an undertaking can be regarded as an infringement by object. Neither EU legislation nor EU case law supports the view that longer duration than two years for a *unilateral non-compete clause to protect the buyer* of an undertaking can be regarded as an infringement by object.
>
> With regard to the restrictive view taken by the CJEU in its landmark judgment of 11 September 2014 in Case C-67/13 P, *Cartes bancaires*, as to classifying something as an infringement by object, Alfa considers that is now obvious that the non-compete clauses when applying the analysis scheme in *Cartes bancaires* cannot be classified as an infringement by object. The interesting question of law concerning the interpretation of Article 101 TFEU now constitutes an "acte éclairé" and it is therefore not necessary to request a preliminary ruling from the CJEU."[91]

[90] Judgment of the Stockholm District Court in Case T 10057-14, *Alfa Quality Moving et al.*, of 16 May 2016, p. 70–71. For an analysis of this judgment see Bengt Domeij's article on "Konkurrensförbud vid företagsöverlåtelser och Alfa Quality Moving-målet", pubilished in *Festskrift till Lars Pehrsson*, edited by Ulf Bernitz et al., published by Jure Förlag in December 2016.

[91] Alfa Quality Moving's written submission to the Swedish Patent and Market Court of Appeal in Case PMT 7498-16, dated 15 September 2016, p. 11–12.

As to the significance of the presumption of innocence under the European Convention of Human Rights, Alfa Quality Moving argued as follows before the Swedish Patent and Market Court:

> "The Stockholm District Court has correctly applied the rules of burden of proof as to whether the non-compete clauses are to be regarded as an infringement by object, respectively an infringement by effects.
>
> The Stockholm District Court found that the Swedish Competition Authority had not proven that the non-compete clauses constituted an infringement by object.
>
> As to the question of anti-competitive effects, the Stockholm District Court stated on page 92 that there is "a lack of evidence for defining the relevant market with a sufficiently high degree of certainty to make it possible to analyse whether an anti-competitive effect may have any appreciable effect on competition".
>
> As to the fundamental question in this case whether the duration of more than two years for the non-compete clauses entails that they shall not be regarded as ancillary, the Stockholm District Court, has incorrectly placed the burden of proof on Alfa.
>
> The Stockholm District Court has incorrectly considered the situation where a non-compete clause constitutes an ancillary restraint as a defense in a situation where an undertaking has been shown to have acted in a way which constitutes an infringement. This is not correct, as a non-compete clause which is ancillary per definition cannot be regarded as infringing Article 101(1) TFEU or Chapter 2, Article 1 of the Swedish Competition Act.
>
> It is true that it follows from Article 2 of Regulation 1/2003 that an undertaking which invokes reasons for an exemption according to Article 101(3) TFEU has the burden of proof. However, Alfa has not even invoked reasons for exemption according to Article 101(3) FEUF or Chapter 2, Article 2 of the Swedish Competition Act.
>
> Therefore, it follows already from competition law that the Swedish Competition Authority has the burden of proof to prove that the non-compete clauses are not ancillary, which is a prerequisite for the non-compete clauses to be capable to infringe Article 101(1) TFEU or Chapter 2, Article 1 of the Swedish Competition Act.
>
> Moreover, it should be noted that, even if it had followed from competition law that Alfa has the burden of proof, there would have been such a conflict of norms with superior law that the competition law related placement of the burden of proof would have had to be set aside.
>
> When applying EU competition law, the Stockholm District Court has, according to Article 51 of the Charter of Fundamental Rights of the European Union a duty to apply the provisions of the Charter. When applying Article 48 of the Charter the corresponding provisions in Article 6 of the European Convention on Human Rights as to, e.g., the presumption of innocence can be regarded as the minimum level of legal protection.
>
> …
>
> Even though the Stockholm District Court has applied an incorrect placement of the burden of proof, – by wrongly placing the burden of proof on Alfa – the Court found that Alfa and the other defendants had proven that a duration of three years was not to long for being regarded as ancillary. However, the Stockholm District Court found that Alfa and the other defendants had not proven that a duration of five years was not too long for being regarded as ancillary.

Alfa considers that – when applying a correct placement of the burden of proof – it is obvious that the Swedish Competition Authority has not managed to prove that the non-compete clauses duration of five years was too long for the clauses to be regarded as ancillary. The very limited space that the Swedish Competition Authority has devoted to the duration of the non-compete clauses in paragraphs 161–163 in its plaint indicates that the Competition Authority's poor investigation in this regard is based on an incorrect view that it is Alfa and not the Swedish Competition Authority which has the burden of proof as to whether the non-compete clauses are to be regarded as ancillary."[92]

6.4 Legal opinion by professor Lars Henriksson

Before the Swedish Patent and Market Court of Appeal, Alfa Quality Moving submitted a comprehensive legal opinion written by Lars Henriksson, professor in competition law at the Stockholm School of Economics. As to the burden of proof in cases concerning fines for breach of competition law in general, professor Lars Henriksson reasoned as follows:

"*Basic requirements of legal certainty which balance interests of procedural economy and the criminal law character of the case*
As the point of departure, it is the Swedish Competition Authority which has the burden of proof for infringements and the relatively severe sanctions which can be imposed on undertakings entail a high standard of proof and that the evidence presented by the Authority must be robust. As set out above, the existence of an infringement by object may thus ease this burden. However, with regard to the *criminal law like character* of administrative fines for breach of competition law it is very important that a clear line is drawn between infringements by object and by result.

Advantages of procedural economy must always be balanced against the interests granted legal protection, which to start with as a point of departure includes a *presumption of innocence* for the party which is accused of having infringed the competition rules. This is particularly due to the legal consequences, including not only fines but also penalty payments. Already because of this, great caution has to be taken when a certain market behavior is to be classified as an infringement by object. The presumption rules advantages as to procedural economy must therefore be balanced against the relatively serious and burdensome consequences these entail for the undertakings concerned.

Even if it follows from Article 23.5 in Regulation 1/2003 that decisions imposing administrative fines for breach of competition law shall not be of a criminal nature, it follows from well-established case law from the CJEU that they are placed on a level with criminal procedure according to the European Convention on Human Rights.

The Swedish Market Court and the Swedish Patent and Market Court of Appeal have aligned themselves to this fundamental principle within competition law and have particularly pointed out that the principle of presumption of innocence should be applied as the sanctions of public law may be very burdensome and constitute

[92] Alfa Quality Moving's written submission to the Swedish Patent and Market Court of Appeal in Case PMT 7498-16, dated 15 September 2016, p. 8–11.

accusation of a criminal offence. Therefore, according to well-established case law, cases concerning fines for breach of competition law have a criminal law character, which, *inter alia*, involves the requirement of clarity embodied in the principle of legality.

Irrespective of whether it concerns an infringement by object or by result, cases concerning fines for breach of competition law have a criminal law resembling character. However, a finding of infringement by object makes it possible for the authority to refrain from investigating the effects of an agreement. As the legislation – as generally is the case for provisions of criminal law – has not pointed out in advance which practices shall be considered forbidden and thereby be subject to sanctions, concerns of legal certainty make it important that it with clarity and precision is clear that a challenged action on the market shall be regarded as an infringement by object

Even though, from the Authority's perspective, there are considerable advantages of procedural economy for reducing the investigation to a *per se*-assessment including presumption of infringements, such advantages cannot, against this background, outweigh fundamental interests of legal certainty in general. However, this does not preclude applying presumption rules in certain situations, but these must be limited to situations where it can be regarded as sure that the challenged behavior as to its nature has harmful effects on competition, irrespective level of market shares, irrespective of conditions in the industry and irrespective of who is taking the measures at hand.

A formalistic approach to infringements – as infringement by object constitutes – must, in my view, necessarily by reserved for very certain cases, because the finding of infringement by object has far-reaching consequences for all undertaking on all markets, without consideration of the concrete effects of the agreements. Therefore, such a finding should only be made for such behavior, where the agreement/practice in itself has an inherent very high risk, or where it is proven that such a behavior normally entail harmful effects on competition or where the agreement/practice in itself with a sufficiently high degree of certainty always is harmful to competition. It is not possible to come to another conclusion even with a low standard of legal certainty."[93]

As to the burden of proof in cases concerning fines for breach of competition law in general, professor Lars Henriksson reasoned as follows:

"In view of what has been said above, there is a lack of experience showing that unilateral non-compete clauses with a duration of 5 years would have harmful features when it comes to mergers under the thresholds. Because of pure reasons of legal certainty, great caution is warranted as to an *e contrario*-application of safe harbour provisions in a non-binding notice (soft law) to the detriment of the individual. In view of the criminal law resembling character of fines for breach of competition law, it is therefore highly questionable to reproach an undertaking just of the fact that it applies a non-compete clause in way which is not in line with a notice, which concerns another prohibition and which addresses another commercial situation.

Moreover, there are good reasons to argue that such a practice is not compatible with the presumption of innocence. In any case, it is clear that the placement of the

[93] Legal opinion *Utlåtande angående accessorisk begränsningar och syftesöverträdelser i samband med företagskoncentrationer* by professor Lars Henriksson of 28 August 2017 submitted to the Swedish Patent and Market Court of Appeal in Case PMT 7498-16, p. 7–9.

burden of proof which is applicable to notifiable mergers cannot be applied i cases concerning fines for breach of competition law, because the Authority has the *full burden of proof* for a non-compete clause to be regarded as illegal.

This means that the Authority has the full burden of proof for proving that a duration which is longer than the one given in the safe harbour provision are illegal. Hence, in cases concerning fines for breach of competition law, the undertakings do not have any duty to exculpate themselves as to the duration of non-compete clauses which exceed the time periods indicated in the safe harbour provisions. Moreover, the clauses cannot be regarded as illegal in themselves, in case they should be regarded as anti-competitive according to Article 101 TFEU/chapter 2, 1 Article of the Swedish Competition Act, the undertakings have any way the possibility to justify them thereafter."[94] (author's translation)

6.5 Legal opinion by professor Maurice Stucke

Before the Swedish Patent and Market Court of Appeal, Alfa Quality Moving submitted a legal opinion on how the duration of non-compete clauses are treated under U.S. competition law, written by Maurice E. Stucke, professor in competition law at the University of Tennessee College of Law in Knoxville. Professor Stucke stated that "U.S. courts on multiple occasions have found a five-year non-compete period to be reasonable under the Sherman Act and state law" and that in "in some states, a covenant with an unlimited duration has been upheld". In particular, professor Stucke highlighted that under California law, for example, "a non-competition agreement can potentially have an indefinite term so long as the buyer continues in the seller's line of business".[95]

Alfa Quality Moving argued that reasoning of Advocate General Nils Wahl in the *Cartes Bancaires judgment*, according to which "only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object"[96], should be followed. In this regard, the considerable U.S. case law represents practical experience in the meaning of the opinion of Advocate General Nils Wahl. The American experience indicates that a duration of five years or more and even an eternal duration may be good for competition. Is this experience relevant when assessing whether experience shows that a five year duration of a non-competition clause is so inherently bad for competition that it should be regarded as an infringement by object under EU law? In its judgment in the *Alfa Quality Moving* case analysed below, the Swedish Patent and Market

[94] Legal opinion by professor Lars Henriksson of 28 August 2017 submitted to the Swedish Patent and Market Court of Appeal in Case PMT 7498-16, p. 27–28.

[95] Legal opinion by professor Maurice E. Stucke of 24 July 2017, *Covenants Not to Compete Under U.S. Federal Antitrust and State Law*, p. 15, submitted to the Swedish Patent and Market Court of Appeal in Case PMT 7498-16.

[96] Opinion of Advocate General Nils Wahl in Case C-67/13 P, *Cartes Bancaires*, of 27 March 2014, para. 56.

Court of Appeal – as opposed to the Stockholm District Court – found that the legal opinion on non-compete clauses under U.S. law written by professor Maurice E. Stucke was indeed relevant for the legal analysis of non-compete clauses under EU competition law as it related to relevant experience concerning non-compete clauses. The Swedish Patent and Market Court of Appeal thus included experience from U.S. case law when assessing whether a conduct in the light of experience is so harmful to competition that it should be regarded as having an anti-competitive object. Hence, this reasoning of the Swedish Patent and Market Court of Appeal opens up for considering experience from other non-EU jurisdictions when assessing whether experience shows that a certain conduct is so harmful to competition that it should be regarded as an infringement by object.

6.6 Decision on admissibility of new evidence by the Swedish Patent and Market Court of Appeal – fines for breach of competition law constitutes sanctions of a criminal nature

The judgment of the Swedish Patent and Market Court of Appeal of 29 November 2017 analysed in the next section does not contain any explicit reference to the criminal nature of fines for breach of competition law. It is therefore interesting to notice the following quote from the Court's decision of 16 August 2017 concerning the admissibility of certain new evidence, where the Swedish Patent and Market Court explicitly stated the following:

> "**The Swedish Patent and Market Court of Appeal first notices** that competition cases constitute actions not amenable to out-of-court settlements, and **that fines for breach of competition law constitute sanctions of a criminal nature** (see the judgment of the Swedish Market Court in Case MD 2013:5, paragraphs 161 och 162, with references there mentioned)." (author's translation and emphasis)

6.7 Judgment of the Swedish Patent and Market Court of Appeal

It its landmark judgment of 29 November 2017 in the Alfa Quality Moving Case, the Swedish Patent and Market Court of Appeal stated as follows:

> "It is obvious that an agreement by which undertakings undertake not to compete with each other during a certain period, e.g. five years, on certain specified markets and which lack a link to any legitimizing transaction or operations, has the object to restrict competition. However, if directly related to a merger, as set out above, such an agreement not to compete with each other during a certain period, may constitute a necessary condition for carrying out the merger and therefore be acceptable from a competition perspective.
>
> There is proven scientific support for the view that con-compete clauses which are directly related to mergers which have a longer duration than two or three years,

unconditionally should be harmful to competition. With regard to the functioning of markets, there are no reasons to presuppose that this should be the case. Bearing in mind that conditions and behaviours on markets gradually change **it is obvious that a merger agreement including such a non-compete clause cannot go from one day to the other from being without negative impact on competition to being so harmful to competition that no anti-competitive result needs to be shown.**[97]

It is thus not possible to set out a generally acceptable duration for a non-compete clause (see the judgment of the Swedish Market Court in Case MD 1998:22). The assessment of whether a non-compete clause is to be regarded as ancillary or not, can thus not be effectuated separately, but must be carried out together with the main transaction which cannot be realized without the ancillary restraint (see the judgment mentioned above of the CJEU in Case C-382/12 *Mastercard*, paragraph 91).

In practice, a non-compete clause can be justified in a particular case for two, three, four (as in Case 42/84 *Remia*) or five years or even longer than so. But where the line has to be drawn for when a non-compete clause ceases to be ancillary and becomes anti-competitive infringing Chapter 2, Article 1 of the Swedish Competition Act must thus normally be assessed on the basis of an investigation of the clause's anti-competitive result. "[98] (author's translation)

This judgment can be regarded as the landmark Swedish judgment as to the implementation of the landmark CJEU judgment in *Cartes Bancaires*. Firstly, the Swedish Patent and Market Court of Appeal follows the judgment in *Cartes Bancaires*, by giving the notion of infringement by object a restrictive interpretation. Secondly, the reasoning of the Swedish Patent and Market Court of Appeal is very well in line with the following reasoning of Advocate General Nils Wahl in the *Cartes Bancaires* case:

"Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restric-

[97] This key sentence in the judgment constitutes almost a direct quote from the author's pleading before the Swedish Patent and Market Court of Appeal on 20 September 2017, as a lead counsel to Alfa Quality Moving.

[98] Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 7498-16, *Alfa Quality Moving* et al., p. 9–10. For an in-depth analysis of this judgment, see Ulf Bernitz article on "Konkurrensklausuler vid företagsöverlåtelser. För hur lång tid kan de vara tillåtna?", published in *Juridisk Tidskrift* 2017–18, nr 3, p. 662–672. See also the article by Robert Sevenius on "Längre konkurrensklausuler skyddar företagsköpare", published in the Lexnova newsmail in March 2018. For an English language analysis, see the article on "Swedish court dismisses non-compete clause appeal" by Malina McLennan published on www.globalcompetitionreview.com on 5 December 2017. For a general analysis of ancillary restraints, see Dagne Sabocki's master thesis *Non-compete Clauses as Ancillary Restraints – are non-compete clauses with an indefinite duration always illegal?* presented at Stockholm University in 2017, which can be downloaded on http://su.diva-portal.org/smash/get/diva2:1081914/FULLTEXT01.pdf.

tive effects necessary for the pursuit of a main objective which does not restrict competition.

Second, such classification relieves the enforcement authority of the responsibility for proving the anti-competitive effects of the agreement or the practice in question. **An uncontrolled extension of conduct covered by restrictions by object is dangerous having regard to the principles which must govern evidence and the burden of proof in relation to anti-competitive conduct.**"[99] (author's emphasis)

7. CONCLUSIONS

7.1 Proposal to amend the Swedish Public Procurement Act highlighting the unlawfulness of joint bids

The provisions in the Swedish Public Procurement Act (LOU) which explicitly stipulate that tenderers are entitled to submit joint tenders or to assign each other as sub-contractors 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 some years ago 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 bidding 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".[100]

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[99] Opinion of Advocate General Nils Wahl in Case C-67/13 P, *Cartes Bancaires*, of 27 March 2014, paragraphs 56–57.

[100] It should be noted that several competition authorities have published guidelines for undertakings on how to self-asess if a specific joint bidding is compatible under competition law. The interactive guidance from the Swedish Competitition Authority can be reached on http://www.konkurrensverket.se/upload/samarbete/story_html5.html, the Danish Guidelines on joint bidding under competition law published in July 2018 were published on the website of the Danish Competition Authority under https://www.en.kfst.dk/media/50765/050718_

7.2 Fines for breach of competition law are of a criminal law character according to the European Convention on Human Rights

Already in 1999, the CJEU ruled in the *Hüls* Case and the *Montecatini* Case of 1999 that fines for breach of competition law are of a criminal law character. However, it was first in 2011 that the European Court of Human Rights, in the *Menarini* Case, a case concerning an Italian administrative fine for breach of competition law, explicitly ruled that administrative fines for breach of competition law are of a criminal law nature.

7.3 The principle of presumption of innocence applies in cases concerning fines for breach of competition law

One of the practical implications of fines for breach of competition law qualifying as having a criminal nature, is that the presumption of innocence applies in such cases according to Article 6 of the European Convention on Human Rights. This means that it is the Competition Authority which, as a rule, has the burden of proof in such cases.

7.4 The requirement of foreseeability of the principle of legality applies in cases concerning fines for breach of competition law

Another practical implication of fines for breach of competition law qualifying as having a criminal nature, is that the principle of legality applies in such cases according to Article 7 of the European Convention on Human Rights. This means that such fines may only be imposed if it was foreseeable for an undertaking by the wording of the competition law provisions, and if applicable, with assistance of relevant case law, that a certain practice would trigger liability under competition law. A particularly interesting situation arises when the Swedish Competition Authority for the first time wants to fine an undertaking for a behavior which has not formerly been fined, which means that there is no prior case law to assist the undertakings to foresee that a certain practice may entail sanctions of a criminal nature. In such a situation, it is standard procedure for the European Commission to impose a symbolic fine that is so low that it should not be considered having a criminal nature and thus risking to infringe the requirement of foreseeability embodied in the principle of legality under Article 7 in the European Convention on Human Rights. For example,

joint-bidding-guidelines.pdf. This kind of guidance is very useful, but it presupposes that undertakings actually are aware of that joint bidding may constitute a serious infringement of competition law, which is why the author recommends that a clarification in this regard is inserted in the Swedish Public Procurement Act.

in the *Organic Peroxide* Case[101], the European Commission imposed a symbolic –and non-criminal law fine of 1 000 Euro on the Swiss consultancy firm AC Treuhand. This was the first time an undertaking not active on the cartelized market (here organic peroxide) was fined for just facilitating the operations of a cartel without itself being active on the market in question. In the absence of prior case law it was arguably not possible, based on the wording of Article 101 TFEU that this cartel facilitating practice would entail liability of a criminal law nature. In the author's view, the Swedish Competition Authority should follow the example of the European Commission in this regard and only request symbolic fines when suing for fines concerning practices not earlier fined in order to ensure that there is no infringement of the principle of legality's requirement of foreseeability embodied in Article 7 of the European Convention on Human Rights. Once the Swedish Competition Authority has brought such a case and the new practice is found to be anti-competitive by the Swedish Patent and Market Court, there will be prior case law in place next time the Swedish Competition Authority brings such a case, where then high sanctions of criminal law nature will be possible to impose without infringing Article 7 of the European Convention on Human Rights.[102] Further arguments for this approach can be found in the article "Företag drabbas när Konkurrensverket testar sträng linje" published by professor Ulf Bernitz in Svenska Dagbladet on 28 November 2014.[103]

The practical competition law implications of the requirement of foreseeability embodied in Article 7 of the European Convention on Human Rights

[101] Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – *Organic Peroxides*), OJ L 110, 30.04.2005, at pages 44–47, upheld by the General Court in Case T-99/04, *Treuhand AG v Commission of the European Communities*, [2008] 5 C.M.L.R. 13. See also Commission Decision of 20 July 1999 in IV/36.888 (World championship in soccer 1998), Commission Decision of 25 July 2001 in COMP/C-1/36.915 (Deutsche Post), Commission Decision of 20 October 2004 in COMP/C.38.238.B.2 (Raw Tobacco Spain), Commission Decision of 20 October 2004 in COMP/C.38.281.B.2 (Raw Tobacco Italy) and Commission Decision of 19 September 2007 in COMP/E-1/39.168 (PO/Hard Haberdashery:Fasteners).

[102] This lign of arguing was made by Alfa Quality Moving before the Swedish Patent and Market Court of Appeal. As no Swedish or European court had fined a non-compete clause directly related to a merger just for an allegedly to long time period of five years it was, in view of prior case law, not foreseeable to the undertakings that a time period of five years might entail liability of a criminal law nature. However, as the Swedish Patent and Market Court found that the five years non-compete clause did not constitute an infringement, the Court had not reason to assess Alfa Quality Moving's argument in this regard.

[103] The on-line version of professor Ulf Bernitz article is available here: https://www.svd.se/foretag-drabbas-nar-konkurrensverket-testar-strang-linje. See also the author Robert Moldén's article "Mandatory Supply of Interoperability Information: The *Microsoft* Judgment", published in (2008) 9 *European Business Organization Law Review* 305–334, p. 328–330. In this article, Robert Moldén analyses whether the novel approach taken by the European Commission as to the so called new product condition implies that only a symbolic fine on non-criminal nature should have been imposed on Microsoft.

have been set out by Denis Waelbroeck, professor in competition law at the College of Europe and the Free University Brussels, in the excellent article on "If the gloves don't fit, acquit" published on 19 July 2017 on the leading European competition blog Chillin'Competition as follows:

> "There is however in my mind a second issue, which has caught less attention and that relates to the predictability of the law.
>
> To put it bluntly, if the Court says: "*this issue is too complex for me to understand and to control*", then the question is: why is it too complex for the Court but not "*too complex*" for companies to understand? Or to put is differently: if the law is "*not clear*", can you really punish parties for infringing it?
>
> This raises in other words an "***Article 7 ECHR issue***. As we know, Article 7 ECHR effectively translates into European law the old Latin rule that "*nulla poena sine lege certa*" ("*No punishment without a clear law*") (see also Article 49 of the European Charter on Fundamental Rights).
>
> The old Romans indeed wisely held that before imposing sanctions, the law should be "*clearer than the day*" (Justinian Code book IV, vol XX, I, 1–258).
>
> In other words, if the Court finds that the law is "*too complex*" to be applied by it, then – in my mind – this has serious consequences:
>
> - First, you cannot impose sanctions on a party for not complying with a law which the Court itself finds "*too difficult to understand*".
> - Second, you cannot give the Commission the "*benefit of the doubt*". Rather, if someone should have the "*benefit of the doubt*", it is the accused and not the enforcer (to put it in Latin again: "*in dubio pro reo*").
> - And still for the same reasons, if the law is not clear, not only there can be no sanction, but there can in my view be no fault giving rise to liability and damage actions.

The **Swiss** *Bundesverwaltungsgericht* has made this point nicely in its *Swisscom* judgment of 24 February 2010 (see 9. Wettbewerbskommission, B.2050/2007, point 4.5.1) where it ruled that the Swiss equivalent of Article 102 TFEU lacked, in and of itself, the predictability necessary for the imposition of penalties.

And also in the **United States**, fines will be imposed for *per se* violations, i.e. for cartels, but not for the more contentious infringements under Section 2 of the Sherman Act for instance. …

Now, as we know, the European Courts have taken on the contrary the view that "*the use of imprecise legal concepts within a provision does not prevent liability being established against a person who contravenes it. As the Commission point out, if it were otherwise, an infringement of Articles 101 or 102 TFEU – which are themselves drawn up using imprecise legal concepts, such as distortion of competition or "abuse" of a dominant position, could not give rise to a fine without the prior adoption of a decision establishing the infringement"* (GC, 27 June 2012, Microsoft, T-167/08, EU:T:2012:323, para. 91).

In view of the general principle of legal certainty, I wonder whether this is the right approach.

But to make myself very clear: my point is not to criticise "*modernisation*", I am all for "*economic based approach*", but my only point is that if it implies that the law becomes "*too complex*" to be reviewed, then the competition authority should look at it differently: then its role is not so much to impose sanctions. Then the authority

> in fact becomes a regulator for the future. That is no less important and no less useful. But it changes obviously significantly the nature of the rule.
>
> So I would like to submit that this is an important dimension which requires further thinking and discussions."[104]

As set out above, the author of this article reaches the same conclusions as put forward by professor Waelbroeck as to the practical implications of Article 7 of the European Convention on Human Rights with regard to the requirement of foreseeability.

7.5 Proposal to amend Regulation 1/2003 to highlight that sanctions for breach of competition law no longer are purely of an administrative law character, but also of a criminal law character according to the European Convention on Human Rights

Even if it follows from Article 23.5 in Regulation 1/2003 that decisions imposing administrative fines for breach of competition law shall not be of a criminal nature, it now follows from the 2011 judgment of the European Court of Human Rights in *Menarini* that such administrative fines in fact are to be regarded as having a criminal nature according to the European Convention on Human Rights. As set out in the European Charter on Fundamental Rights, the European Convention on Human Rights shall be regarded as the minimum protection level, which means that the provisions in the European Convention on Human Rights take precedence over the provisions in Regulation 1/2003. The wording of Article 23.5 in Regulation 1/2003 has thus become misleading and to some degree obsolete. It is therefore proposed that Regulation 1/2003 should be amended to reflect the fact that administrative fines concerning breach of competition law may be of a criminal nature under the European Convention on Human Rights.

7.6 The case law of the Swedish Supreme Court, the former Swedish Market Court and the new Swedish Patent and Market Court of Appeal is in line with the European Convention on Human Rights in combination with the CJEU landmark judgment in *Cartes Bancaires*

As set out above, it was on 27 September 2011 that the European Court of Human Rights ruled in the landmark *Menarini* Case that administrative fines for breach of competition law is of a criminal nature. On 18 October 2013, the Swedish Supreme Court followed *Menarini*, by finding that an administrative

[104] https://chillingcompetition.com/2017/07/18/if-the-gloves-dont-fit-acquit-by-denis-waelbroeck/, Chillin'Competition is edited by Alfonso Lamadrid and Pablo Ibáñez Colomo.

environmental charge of even the modest amount of 5 000 SEK was of a criminal nature in the meaning of the European Convention on Human Rights. Already a few months before the judgment of the Swedish Supreme Court, the Swedish Market Court had come to the same conclusion in its judgment in the *TeliaSonera* Case of 12 April 2013 as to fines for breach of competition law, an approach later confirmed by the Swedish Market Court on 17 April 2015 in the *Swedavia* Case. Moreover, a set out above, the new Swedish Patent and Market Court in its judgment on 29 November 2017 in the *Alfa Quality Moving* Case followed the *Menarini* approach of the Swedish Supreme Court and the Swedish Market Court, in particular by fully upholding the principle of presumption of innocence.

7.7 The case law of the Stockholm District Court and the Swedish Patent and Market Court is *not* fully in line with the European Convention of Human Rights in combination with the CJEU landmark judgment in *Cartes Bancaires* as well as the CJEU judgment in *Hüls*

It was in its 2014 *Tyres* Case judgment that the Stockholm District first presented its line of reasoning why the burden of proof of showing that the undertakings could not have submitted independent tenders on their own should be on the undertakings and not the Swedish Competition Authority (see section 2.2.5 above):

> **"General considerations concerning the burden of proof and standard of proof concerning the capacity to submit a tender on its own etc.**
> The Swedish Competition Authority has presented convincing evidence showing that Däckia and Euromaster have participated in pure sales cooperation related to public procurement proceedings handled by Gästrike Inköps and the Swedish Police Authority during the year 2005. As already has been mentioned, the burden of proof is on the Swedish Competition Authority to prove that the alleged infringements have occurred. The question is how the burden of proof is to be placed and which standard of proof should apply as to the objection raised by Däckia and Euromaster that the tenders have been lawful. In principle, the situation is such that the defendants, confronted with a comprehensive investigation showing that pure sales cooperation has occurred, raise an objection of a lawful bidding consortium.
>
> With regard to the character of the procurement proceedings, the objection raised by Däckia and Euromaster in reality amounts to that they were not actual or potential competitors related to the procurement proceedings handled by Gästrike Inköps respectively the Swedish Police Authority, which is why the tender of the Swedish Police Authority has not constituted sales cooperation between competitors.
>
> A possible way of placing the burden of proof would be, as in criminal cases, to place the burden of proof on the Swedish Competition Authority to refute such an objection and that the standard of proof is placed so that the Swedish Competition Authority has to submit so much evidence that the objection can be considered unfounded (see NJA 2009 p. 234). However, such a solution would not be suitable.

> In view of the question of standard of proof being regulated in Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (below referred to as Regulation 1/2003), and the close conformity with EU law envisaged by the Swedish Competition Act, guidance on the placement of the burden of proof should in the first place instead be taken from EU law.
>
> According to general principles of EU law, the presumption of innocence is applied in matters concerning the infringement of competition law applicable to undertakings and which can lead to fines or penalties being imposed. (Hüls, paragraphs 150, 154). The principle of innocence follows, *inter alia*, from Article 6.2 of the European Convention on Human Rights.
>
> According to well-established case law in competition law cases, it is up to an undertaking which has been found to have acted in a way which normally constitutes an infringement, to submit evidence which prove the opposite. Such a rule does not reverse the burden of proof in an illicit way (Hüls, cited above, paragraph 155, also Montecatini, cited above, paragraph 18). It concerns an action not amenable to out-of-court settlement according to the Swedish Competition Act. **The Stockholm District Court considers that the undertakings have the burden of proof as to the assertion that decision of the Swedish Tyres Association to submit common prices have been necessary for being able to submit a tender.** If the burden of proof for such assertions is placed on the Swedish Competition Authority, it would become extremely difficult for the Authority to prove infringements, because an ex post analysis of the undertaking's supply capacity depends on a very thorough analysis of the concerned undertakings' internal operations, in a way which is difficult to achieve even with the far-reaching investigation powers entrusted on the Swedish Competition Authority. Moreover, the undertakings are free to submit new objections during the process, which is after the investigation has been concluded. It would therefore be inappropriate to place the burden of proof on the Swedish Competition Authority to refute the undertakings' objections. Instead, the burden of proof for such an objection at hand in this case should instead be on the undertakings themselves in accordance with the principle according to which the burden of proof is to be placed on the party best placed to secure the evidence. The undertakings are indeed best placed to secure evidence themselves as to the lack of capacity to submit a tender on their own.
>
> The Stockholm District Court considers that the standard of proof for the undertakings to prove their objection should not be particularly high."[105] (author's translation and emphasis)

As point of departure, the Stockholm District Court recognizes the principle of presumption of innocence embodied in Article 6 of the European Convention, which normally would imply that the Swedish Competition Authority would have the full burden of prove for showing that the undertakings did not have the capacity to submit independent tenders on their own. However, the Stockholm District Court then invokes the judgment of the CJEU in *Hüls* as the legal basis for reversing the burden of proof, *de facto* placing the full burden of proof

[105] Judgment of the Stockholm District Court on 21 January 2018 in Case T 18896-10, *Däckia*, p. 118–119.

(even if not to a particularly high standard) on the undertakings. It is therefore important to analyse the judgment of the CJEU in *Hüls* in this regared. In *Hüls*, the CJEU stated the following:

> "Fourthly, it must be borne in mind that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Baustahlgewebe v Commission, cited above, paragraph 58).
>
> **However, since the Commission was able to establish that Hüls had participated in meetings between undertakings of a *manifestly* anti-competitive nature, it was for Hüls to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. The Court of First Instance did not therefore improperly reverse the burden of proof in paragraph 126 of the contested judgment.**"[106] (author's translation and emphasis)

It is interesting to note that in *Hüls*, the European Commission had been able to prove that Hüls had participated in a meeting of manifestly anti-competitive nature. According to well-established case-law of the CJEU, an undertaking which participates in a meeting having a manifestly anti-competitive nature cannot escape responsibility under EU competition law by simply being silent during the meeting. In order to be compliant with EU competition law in such a situation, an undertaking has an active duty either to immediately leave the meeting or to actively inform the other participants in the meeting that it participates in a spirit different from theirs. In the author's view, it may in such a very special situation actually be compatible with the presumption of innocence to require from Hüls to put forward evidence as to its spirit in this regard.

However, in the *Tyres* Case, the Swedish Competition Authority had merely proven that the joint bidding constituted pure sales cooperation, which was rather obvious from the facts of the case. In the author's view, the Swedish Competition Authority had not proven, to the standard required in the CJEU's *Hüls* judgment that the undertakings had participated in a *manifestly* anti-competitive practice. In fact, the Swedish Competition Authority had not even proven that the undertakings had participated in any anti-competitive practice at all, since joint bidding is not always bad for competition. Joint bidding may even be good for competition if it enables small undertakings lacking the capacity to submit independent tenders on their own to enter the market and participate in a given public procurement proceeding.

Moreover, even if the Swedish Competition Authority had proven that the undertakings had participated in a practice of manifestly anti-competitive nature, if is not at all clear that it in such a situation would have been compati-

[106] Judgment of the CJEU on 8 July 1999 in Case C-199/92 P, *Hüls*, paragraph 154–155.

ble with the presumption of innocence to reverse the burden of proof. It should be borne in mind that the *Hüls* judgment was given by the CJEU in 1999, while it was first in the 2011 *Menarini* judgment that the European Court of Human Rights found that administrative fines for breach of competition law constitutes sanctions of criminal law nature. More importantly, it is the European Court of Human Rights which is the superior court to have the final word on the interpretation of the European Convention on Human Rights. It is therefore actually conceivable that the European Court of Human Rights would find that the reasoning of the CJEU's in its *Hüls* judgment is contrary to the presumption of innocence as it places the burden of proof to a certain degree on the undertakings, while the presumption of innocence normally requires that a prosecutor in criminal cases has to prove that *all* the conditions for applying a provision of criminal law is fulfilled.

In conclusion, the author considers that that judgment of the Stockholm District Court in the *Tyres* Case, which in fact places all of the burden of proof on the undertaking to prove what is disputed in the case, is not fully in line with the European Convention on Human Rights and the judgments of the CJEU in *Cartes Bancaires* and *Hüls*. As the parties did not appeal the judgment of the Stockholm District Court, we will not know for sure what the position of the Swedish Patent and Market Court of Appeal would have been as to *de facto* placing the full burden of proof on the undertakings instead of placing it on the Swedish Competition Authority.

Even more unfortunate, the same applies to the following three cases analysed in this article, where the Stockholm District Court, using the same legal analysis as in the *Tyres* Case almost word by word, de facto places the full burden of proof on the undertakings instead of the Swedish Competition Authority:

- The Aleris Clinical Physiology Services Case (see section 2.2.6 above)
- The Telia/GothNet Data Communication Services Case (see section 3.1.1 above)
- The Alfa Quality Moving Case (see section 6 above)

Contrary to the Stockholm District Courts' judgment in the *Tyres* Case, all of the three judgments were appealed to the Swedish Patent and Market Court of Appeal, annulling all of the three judgments. Still, it is not possible to deduce from the three judgments what is the actual view of the Swedish Patent and Market Court of Appeal as to *de facto* placing the full burden of proof on the undertakings instead of placing it on the Swedish Competition Authority. The reason for this is, as set out above, that the Swedish Patent and Market Court of Appeal squashes all the three judgments of the Stockholm District Court on other legal grounds not related to the burden of proof. However, in the view of the author, it is likely that any new judgment from the Stockholm District

Court which is not fully in line with the principle of innocence embodied in Article 6 of the European Convention on Human Rights will actually be annulled by the Swedish Patent and Market Court of Appeal.

7.8 The Swedish Competition Authority should focus on an in-depth investigation of whether the undertakings lack the capacity to submit independent tenders on their own when investigating cases of joint bidding

According to the current case law of the Stockholm District Court set out above, it is not the Swedish Competition Authority but the undertakings who have the burden of proof to show that they lacked the capacity to submit independent tenders on their own. If the new Swedish Patent and Market Court at the Stockholm District Court were to uphold the earlier case law of the Stockholm District Court to place the burden of proof on the undertakings in future cases of allegedly joint bidding it appears, *prima facie*, that there would be no need for the Swedish Competition Authority to devote considerable resources to investigate the complex issue whether the undertakings lack the capacity to submit independent tenders on their own when investigation cases of joint bidding.

However, as argued above, the well-established case law of the Stockholm District Court to put the burden of proof on the undertakings to prove that they lack the capacity to submit independent tenders of their own is not fully in line with the presumption of innocence according to Article 6 of the European Convention and the restrictive approach as to the scope of infringement by object required by the CJEU in its *Cartes Bancaires* judgment. Nor would such an approach be in line with the approach to give full effect to the presumption of innocence by the Swedish Supreme Court in the *Kezban* Case, by the Swedish Market Court in the *TeliaSonera* expressed by the *Swedavia* Case as well as by the new Swedish Patent and Market Court of Appeal in the *Alfa Quality Moving C*ase. This means that, any future judgment of the Swedish Patent and Market Court at the Stockholm District Court placing the burden of proof on the undertakings, is likely to be overturned by the Swedish Patent and Market Court of Appeal. Therefore, it would indeed make sense for the Swedish Competition Authority when investigating future cases of joint bidding from the outset to focus heavily on the issue whether the undertakings lack the capacity to submit independent tenders.

7.9 The Swedish Competition Authority should start bringing cases concerning fines for breach of competition law even if a practice lacks anti-competitive object, if it has anti-competitive effects

To the author's knowledge, the Swedish Competition Authority has not sued for fines in a single case where the investigation leads to the conclusion that a practice "only" has anti-competitive effects but no anti-competitive object.[107]

This extremely restrictive policy as to imposing fines on practices with just anti-competitive results might have been justified in a situation where the notion of infringement by object was supposed to have a broad scope.

However, as is clear from the CJEU judgment in *Cartes Bancaires* and the judgment of the Swedish Patent and Market Court of Appeal in *Alfa Quality Moving*, the scope for classifying an anti-competitive practice as an infringement by object is very limited. This makes it even more important for the Swedish Competition Authority to finally start bringing on cases of anti-competitive effects without anti-competitive object, as there otherwise would be a serious risk for an enforcement gap concerning a large number of practices which are indeed bad for competition but cannot (longer) be classified as infringements by objects. This applies in particular to joint bidding. Even if joint bidding no longer can be classified as an infringement by object, when a complex and in-depth analysis first is needed as to whether the undertakings had the capacity to submit independent tenders of their own, joint bidding can still have very serious anti-competitive effects when entered into by undertakings which in fact could have submitted independent tenders of their own. The author's policy recommendation in this regard is based on the view expressed by Advocate General Nils Wahl who in his opinion in *Cartes Bancaires* stated:

> **"62. Lastly, I would observe that such an interpretation does not effectively 'immunise' certain conduct by exempting it from the prohibition under Article 81(1) EC. Where it has not been established that a certain agreement is not specifically — that is to say in the light of its objectives and its legal and economic context — capable of preventing, restricting or distorting competition on the market, only recourse to the concept of restriction by object is ruled out. The competition authority will still be able to censure it after a more thorough examination of its actual and potential anti-competitive effects on the market."**[108] (author's emphasis)

[107] However, there are examples where the Swedish Competition Authority has taken injunction decisions under threat of penalty payments against practices which just have anti-competitive effects without having an anti-competitive object. In the view of the author, however, in the absence of risk for fines, such injunctions decisions do not have a sufficiently dissuasive character, as they create incentives for undertakings to enter into anti-competitive practices and to continue to implement them until an injunction decision has been made binding.

[108] Opinion of Advocate General Nils Wahl in Case C-67/13 P, Cartes Bancaires, of 27 March 2014, para. 62.

7.10 New principle of contracting authority reduced competition excluding infringement by object

In the landmark judgment in the Aleris Clinical Physiology Services Case of 2017, the Swedish Patent and Market Court of Appeal establishes a new principle when assessing whether a cooperation between tenders related to a public procurement proceeding is to be regarded as having an anti-competitive object, when considering the economical and legal context. If competition in a public procurement proceeding is hampered by the way the contracting authority has designed it, cooperation between suppliers that would normally constitute an infringement by object cannot be regarded as infringement by object – because the reduction of competition induced by the contracting authority has to be taken into consideration when putting the cooperation in its economic and legal context. It is proposed that the new principle established by this judgment can be called the principle of contracting authority reduced competition excluding infringement by object. This new principle has been confirmed by the Swedish Patent and Market Court in its judgment in the Telia/GothNet Data Communication Services Case of 2018.

Finally, it would of course be interesting to compare this new principle of competition law analysis with the new competition principle embodied in Chapter 4, Article 2 of the new Swedish Public Procurement Act (LOU) as of 1 January 2017. However, this is outside the scope of the present article, and will instead be analysed in the author's article on the new competition principle in the EU public procurement directives due to be published in the next edition of *Europarättslig Tidskrift*, in March 2019.

APPENDIX J:

SECOND DOCTORAL ARTICLE

'The New Competition Principle in the New EU Public Procurement Directives – From a Swedish Perspective'

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THE NEW COMPETITION PRINCIPLE IN THE NEW EU PUBLIC PROCUREMENT DIRECTIVES – FROM A SWEDISH PERSPECTIVE

Robert Moldén*

1. INTRODUCTION

1.1 Purpose and Structure of this Article

Back in December 2012, the author of the present article published a first comprehensive article in *Europarättslig Tidskrift* on the interaction between competition and public procurement law titled "Public Procurement and Competition Law From a Swedish Perspective – Some Proposals for Better Interaction".[1]

In the context of public procurement, competition law may be applicable to both of the two different sides of a public procurement proceeding: (i) *tenderers* as sellers and (ii) *contracting authorities* as buyers. My first comprehensive

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1 "Public Procurement and Competition Law From a Swedish Perspective – Some Proposals for Better Interaction" (2012) 15 *Europarättslig Tidskrift* 557-615. This article has also been published on the website of the Swedish Competition Authority: http://www.konkurrensverket.se/globalassets/forskning/projekt/09-0062_artikel_robert-molden_public-procurement-and-competition-law-from-a-swedish-perspective-some-proposals-for-better-interaction.pdf. For a recent article on the interaction between competition law and public procurement, see the article "Konkurrensrättens inverkan på offentliga upphandlingar" written by the former chief legal officer of the Swedish Competition Authority Per Karlsson and published in *Upphandlingsrättslig Tidskrift* (2018), Vol. 3, 107. See also Johan Hedelin, "Statsstöd, upphandling och konkurrens" (2018) 21 *Europarättslig Tidskrift* 33-56.

article published in December 2012 as part of my licentiate compilation thesis on the interaction of competition and public procurement law covered both sides, i.e. competition law applicable to tenderers as well as competition law applicable to contracting authorities. In order to obtain the necessary space for an updated and more in-depth analysis of the interaction of competition and public procurement law at the current doctoral level, the scope of the original comprehensive article has been split into two separate articles.

As to competition law applicable to (i) tenderers, this side has already been subject to a new comprehensive and updated article titled "Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the *Cartes Bancaires* and the *Alfa Quality Moving* landmark judgments transform the application of Swedish and EU competition law as to the burden of proof" published in *Europarättslig Tidskrift* in December 2018.[2]

As to competition law applicable to (ii) contracting authorities, this side is now the subject of the present article.

Section 2 of this article will address the issue of *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. Finally, *competition law applicable to long-term agreements and joint purchasing* will be presented making analogies to the public procurement rules on too long, respectively too large framework agreements. Moreover, this section will set out what unilateral conduct by a contracting authority may constitute abuse of a dominant position.

Section 3 will present what is arguably a new principle of contracting authority reduced competition excluding infringement by object, introduced by the Swedish Patent and Market Court of Appeal in the Aleris Clinical Physiology Services Case of 2017 and the Telia/GothNet Data Communication Services Case of 2018. Section 3 and Section 2 are the only sections in this article applying competition *law* to public procurement proceedings. The remainder of this article will focus on competition *aspects* within public procurement law in itself.

Competition may impact the application of public procurement law either *indirectly* (sections 4 and 5) or *directly* (sections 6 and 7).

Section 4 provides an overview over how competition has an indirect impact on the application of public procurement law through the *principle of proportionality*.

[2] "Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the *Cartes Bancaires* and the *Alfa Quality Moving* landmark judgments transform the application of Swedish and EU competition law as to the burden of proof" (2018) 21 *Europarättslig Tidskrift* 593-657.

Section 5 provides an overview over how competition has an indirect impact on the application of public procurement law through the *principle of equality*.

Section 6 focuses on how competition has a direct impact on the application of public procurement law concerning *framework agreements.* In particular, the case of too long respectively too large framework agreements will be analysed. It is argued that the provisions in Article 32 (2) of the Former Classical Sector Directive of 2004 established a framework related competition principle. Moreover, it is argued that the framework related competition principle has been reaffirmed by Recital 61 of the New Classical Sector Directive of 2014.

Section 7 presents what is arguably a new general competition principle stipulated by Article 18 (1) of the New Classical Sector Directive of 2014.

Section 8 presents the overall conclusions of this article on the New Competition Principle in the EU Public Procurement Directives – From a Swedish Perspective.

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 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.[3] For the benefit 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 also designed to be able to be used as course literature for Swedish and Nordic students in competition and public procurement law as well as course literature for students at universities in other EU countries, such as the students at the International Master Program in Public Procurement Management at the University of Rome Tor Vergata and at the

[3] 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.

University of Belgrade where the author has been teaching on the interaction between competition and public procurement law for several years.[4]

This article is part of a series of articles related to public procurement and anti-competitive information exchange, which, taken together, shall be presented as the author's doctoral thesis in competition and public procurement law at the Stockholm School of Economics in spring 2020.[5] Any comments and suggestions will therefore be very much appreciated and taken into account when preparing the final doctoral thesis.[6]

1.2 Introduction to Swedish Public Procurement and Competition Law

Swedish public procurement in the classical sector is governed by the new Swedish Public Procurement Act which entered into force on 1 January 2017. In this article, the Act will be referred to as the **New LOU of 2017**, where LOU is the established Swedish abbreviation for "Lag (2016:1145) om offentlig upphandling".[7] The New LOU implements the new Directive 2014/24/EU concerning public procurement in the classical sector.[8] In this article, this Directive will be

[4] For information on this excellent and truly international postgraduate master program (IMPPM) directed by professor Gustavo Piga and attracting outstanding public procurement officials from many countries around the world, see http://www.masterprocurement.eu/

[5] On 15 December 2016, some of the earlier articles were presented as parts of the author's licentiate dissertation at the Stockholm School of Economics with the title "Competition and Public Procurement – With Special Focus on Pro-competitive and Anti-competitive Information Exchange as well as the New Competition Principle of the New EU Public Procurement Directives". The licentiate dissertation has been published on the website of the Swedish Competition Authority: http://www.konkurrensverket.se/globalassets/forskning/projekt/09-0062_robert-moldens-licentiate-thesis_15december2016.pdf.

[6] The author welcomes comments and suggestions related to this article to robert.molden@front.law.

[7] The Swedish Competition Authority has published a non-official translation of LOU into English, which is used in this article and can be downloaded under: http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/swedish-public-procurement-act.pdf. The leading Swedish introductory textbook in the field of public procurement law is Kristian Pedersen, *Upphandlingens grunder* (Jure Förlag AB, fith edition, 2019). The leading handbook is Helena Rosén Andersson, Eva-Maj Mühlenbock, Henrik Willquist and Catharina Piper, Lagen om offentlig upphandling – En kommentar (Norstedts Juridik, second edition, 2015). For a 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). For a recent textbook on Danish public procurement law, see *Udbudsretten* co-authored by many of Denmark's leading public procurement lawyers and edited by professor Steen Treumer at the University of Copenhagen (Ex Tuto, 2019). The leading book on the interaction between competition and public procurement is *Public Procurement and the EU Competition Rules*, written by Albert Sánchez Graells (Bloomsbury, second edition, 2015). In 2009, the OECD published its *Guidelines for Fighting Bid Rigging in Public Procurement – Helping governments to obtain best value for money*: https://www.oecd.org/competition/cartels/42851044.pdf.

[8] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

referred to as the **New Classical Sector Directive of 2014**. Until 31 December 2016, Swedish public procurement in the classical sector was governed by "Lag (2007:1091) om offentlig upphandling", hereafter referred to as the **Former LOU of 2008**. It implemented the preceding Directive 2004/18/EC concerning the coordination of award procedures in the classical sector, hereafter referred to as the **Former Classical Sector Directive of 2004**.

Swedish public procurement in the utilities sector is governed by the Swedish Public Procurement Act in the Utilities Sectors. In this article, the Act will be referred to as the **New LUF of 2017**, where LUF is the established Swedish abbreviation for "Lag (2016:1146) om upphandling inom försörjningssektorerna". The New LUF of 2017 implements Directive 2014/25/EU concerning public procurement in the Utilities sectors.[9] In this article, this Directive will be referred to as the **New Utilities Sector Directive of 2014**. Until 31 December 2016, Swedish public procurement in the utilities sector was governed by "Lag (2007:1092) om upphandling inom områdena vatten, energy, transporter och posttjänster", hereafter referred to as the **Former LUF of 2008**. It implemented the preceding Directive 2004/17/EC coordinating the procurement procedures in the in the utilities sector, hereafter referred to as the **Former Utilities Sector Directive of 2004**. The new Swedish Concessions Procurement Act of 2017[10] and the Swedish Defence and Security Procurement Act[11] will not be analysed in this article.

Swedish competition law is governed by the **Swedish Competition Act** of 2008[12] containing provisions prohibiting anti-competitive agreements and

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9 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. As to the new Swedish Concessions Procurement Act of 2017, "Lag (2016:1147) om upphandling av koncessioner" implementing Directive 2014/23/EU, as well as well as the Swedish Defence and Security Procurement Act, "Lag (2011:1029) om Upphandling på försvars- och säkerhetsområdet") implementing Directive 2009/81/EU, these Acts will not be analysed in this article.

10 "Lag (2016:1147) om upphandling av koncessioner", implementing Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

11 "Lag (2011:1029) om Upphandling på försvars- och säkerhetsområdet"), implementing Directive 2009/81/EU of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

12 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 is used in this article and can be downloaded under: http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-swedish-competition-rules--an-introduction.pdf. The Swedish Competition Authority has also published a non-official translation into English of the Swedish Competition Act, which can be downloaded under: http://www.konkurrensverket.se/globalassets/english/competition/the-swedish-competition-act.pdf

abuse of a dominant position, which constitute copies of Articles 101 and 102 TFEU. According to the preparatory works behind the preceding Competition Act, The Swedish Competition Act of 1993, Konkurrenslagen (1993:20), 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 practice and jurisprudence of the Court of Justice can serve as guidance when interpreting the Swedish Competition Act.[13]

The Swedish Supreme Court has, in a case concerning the existence of a dominant position,[14] 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 effectuated 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)[15] with its approximately 160 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[16] as well as 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.[17] Moreover, the Swedish Competition Authority is entitled to take decisions making voluntary commitments mandatory, under threat of penalty payments.[18] The Authority is also entitled to issue non-man-

The leading Swedish introductory textbooks in the field of competition law are Ulf Bernitz, *Svensk och europeisk marknadsrätt 1 – Konkurrensrätten och marknadsekonomins rättsliga grundvalar* (Norstedts Juridik, fifth edition, 2019) and Leif Gustafsson and Jacob Westin, *Konkurrensreglerna i klartext* (Norstedts Juridik, 2016). The leading handbooks are Johan Karlsson and Marie Östman, *Konkurrensrätt – En handbok* (Karnov Group, fifth edition, 2014) as well as Kenny Carlsson and Mats Bergman, *Konkurrenslagen – En kommentar* (Norstedts Juridik, second edition, 2015).

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

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

15 In September 2007, the enforcement activities as well as information activities of the Swedish National Board for Public Procurement (Nämnden för offentlig upphandling – NOU) were transferred to the Swedish Competition Authority, www.kkv.se. On 1 September 2015, the information activities were transferred from the Swedish Competition Authority to a new National Agency for Public Procurement (Upphandlingsmyndigheten), www.upphandlingsmyndigheten.se. However, the responsibility for enforcing public procurement law has remained with the Swedish Competition Authority.

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

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

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

datory fine orders.[19] These decisions by the Swedish Competition Authority can be appealed to the Swedish Patent and Market Court at the Stockholm District Court.[20]

A peculiarity of Swedish procedural competition law consists of the fact that the Swedish Competition Authority may not take any mandatory decision on its own to impose fines for breaches of Swedish or EU competition law. In these cases, the Swedish Competition Authority has to start proceedings against the undertakings involved at the Swedish Patent and Market Court at the Stockholm District Court.[21] It is thus the Swedish Patent and Market Court which may impose a fine, as a first instance court.

The judgments of the Swedish Patent and Market Court can only be appealed to the Swedish Patent and Market Court of Appeal at the Svea Court of Appeal.[22] The general rule is that a further appeal to the Swedish Supreme Court is not possible. The Swedish Act on Patent and Market Courts of 2016[23] does allow exceptions from this rule, however, only when the Swedish Patent and Market Court of Appeal deems such an appeal to be needed. According to the preparatory works behind the Act on Patent and Market Courts of 2016, an appeal to the Swedish Supreme Court could come into question only if there is a general need for a more overarching precedent where other areas of law come into play as well.[24] There are no known judgments that have been successfully appealed to the Swedish Supreme Court under this regulation yet.

A 2016 Government-commissioned report proposed expanding the powers of the Swedish Competition Authority to also include the issuing of fines without a prior ruling of the Patent and Market Court. The idea was to align the Swedish Competition Authority's powers with those of the European Commission as well as to make the enforcement of competition law more effective.[25] The Swedish Parliament finally chose not to expand the powers of the Swedish Competition Authority to include the issuing of fines without a prior ruling of the Swedish Patent and Market Court. However, as from 1 January 2018, the

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19 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.

20 Chapter 7, Article 1 of the Swedish Competition Act.

21 Chapter 4, Article 5 of the Swedish Competition Act. http://www.stockholmstingsratt.se/Om-tingsratten/Patent--och-marknadsdomstolen/

22 Patent- och marknadsöverdomstolen, www.patentochmarknadsoverdomstolen.se. Patent- och marknadsöverdomstolen replaced the previous Marknadsdomstolen as of 1 September 2016.

23 Lag (2016:188) om patent- och marknadsdomstolar.

24 See prop. 2015/16:57, p. 165.

25 See Swedish Government Official Report SOU 2016:49 on expanding the decisive rights for the Swedish Competition Authority (En utökad beslutanderätt för Konkurrensverket).

Swedish Competition Authority obtained the power to adopt decisions prohibiting a merger without having to go to court to do so.[26]

2. COMPETITION IMPACT ON PUBLIC PROCUREMENT BY WAY OF COMPETITION LAW APPLICABLE TO CONTRACTING AUTHORITIES WHEN PROCURING

2.1 Under What Conditions is Competition Law Applicable to Contracting Authorities when procuring?

2.1.1 Why is the control of buyer power exercised by contracting authorities an under-enforced area of competition law – as opposed to seller power exercised by tenderers

As set out in the author's recent article in *Europarättslig Tidskrift* on bid-rigging and public procurement related information exchange mentioned above[27], 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.

What then, about anti-competitive cooperation between buyers in public procurement proceedings? Swedish contracting authorities procure for approximately 700 billion SEK annually, which corresponds to approximately 18 % of Swedish GDP[28], which is relatively high compared to the average EU-wide figure of 14 %.[29] As to certain goods and services, Swedish contracting authorities will therefore 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 Competi-

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[26] Chapter 4, Article 1 of the Swedish Competition Act. According to Chapter 4, Articles 15 and 16, such a prohibition decision may be appealed to the Swedish Patent and Market Court and then to the Swedish Patent and Market Court of Appeal.

[27] "Bid-rigging and Public Procurement Related Information Exchange – How the European Convention on Human Rights as well as the *Cartes Bancaires* and the *Alfa Quality Moving* landmark judgments transform the application of Swedish and EU competition law as to the burden of proof" (2018) 21 *Europarättslig Tidskrift* 593-657.

[28] Report 2018:9 "Statistik om offentlig Upphandling 2018", p. 34, published by the Swedish Competition Authority in on its website www.kkv.se.

[29] Commission Communication, Making Public Procurement work in and for Europe, COM (2017) 572 final, 3 October 2017, p. 2.

tion 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 contracting authorities' procurement as well as to other forms of buyers' cooperation 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 of competition generated by private entities participating in public 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."[30]

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 New LOU Chapter 4, Article 3, which stipulates:

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

> "A contracting authority should take environmental considerations, and social and labour law considerations into account in public procurement, if the nature of the procurement so justifies."

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.[31]

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."[32] (emphasis added)

2.1.2 Proposal of the European Commission to avoid excessive concentration of purchasing power by monitoring the aggregation and centralisation of public procurement (Recital 59 of the New Classical Sector Directive of 2014)

It is interesting to note that the European Commission in its New Classical Sector Directive of 2014 points out the importance of avoiding excessive concentration of purchasing power held by contracting authorities and therefore

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[31] For an interesting in-depth analysis of buyer power under EU competition law, see Ignacio Herrera Anchustegui's doctoral dissertation at the University of Bergen, *Buyer Power in EU Competition Law*, the author of this article participated at the disputation which took place in Bergen on 10 February 2017. For an interesting 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* (2013).

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

suggest that the aggregation and centralisation of public procurement should be monitored:

> "There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs."[33]

2.1.3 The Car Battery Buyers' Cartel of 2017 – Decision of the European Commission[34]

One recent example of the Commission's increased focus on anti-competitive cooperation between buyers is the recent Car Battery Byers' Cartel decision, which is summarised in the Commission's press release as follows:

> The European Commission has fined Campine, Eco-Bat Technologies and Recylex a total of €68 million for fixing prices for purchasing scrap automotive batteries, in breach of EU antitrust rules. A fourth company, Johnson Controls, was not fined because it revealed the existence of the cartel to the Commission.
>
> Commissioner Margrethe Vestager, in charge of competition policy, said: "Well functioning markets can help us reduce waste and support the circular economy. Therefore, we do not tolerate behaviour that undermines competition. The four companies fined today have colluded to maximise their profits made from recycling scrap batteries, reducing competition in this essential link of the recycling chain."
>
> From 2009 to 2012, four recycling companies took part in a cartel to fix the purchase prices of scrap lead-acid automotive batteries in Belgium, France, Germany, and the Netherlands. The companies are Campine (Belgium), Eco-Bat Technologies (UK), Johnson Controls (US) and Recylex (France). Recycling companies purchase used automotive batteries (from cars, vans or trucks) from scrap dealers or scrap collectors. The used batteries are obtained from collection points such as garages, maintenance and repair workshops, battery distributors, scrapyards and other waste disposal sites. Recycling companies carry out the treatment and recovery of scrap batteries and then sell recycled lead, mostly to battery manufacturers, who use it to make new car batteries. Unlike in most cartels where companies conspire to increase their sales prices, the four recycling companies colluded to reduce the purchase price paid to scrap dealers and collectors for used car batteries. By coordinating to lower the prices they paid for scrap batteries, the four companies disrupted the normal functioning of the market and prevented competition on price. This behaviour was intended to lower the value of used batteries sold for scrap, to the detriment of used

[33] Recital 59 och the New Classical Sector Directive of 2014.
[34] Decision of the European Commission in Case AT.40018, of 8 February 2017.

battery sellers. The companies affected by the cartel were mainly small and medium-sized battery collectors and scrap dealers.

The majority of the anti-competitive contacts between the four recycling companies took place on a bilateral basis, mainly through telephone calls, emails, or text messages. Some contacts also took place in person, either in bilateral meetings or, less frequently, in multilateral meetings. The parties were well aware of the illegal character of their contacts and sometimes tried to disguise them by using coded language, for example referring to weather conditions to signal different price levels. Today's decision ensures that there will be competition on the merits between recyclers of automotive batteries and real competitive price setting for used automotive batteries."[35]

2.1.4 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)

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-sections, 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.

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]**."[36](emphasis added)

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[35] Press release of the European Commission of 8 February 2017, IP/17/245.

[36] Judgment of the General Court in Case T-319/99, *FENIN* v *Commission*, of 4 March 2003, para. 36–37.

The reasoning of the General Court in this respect was subsequently upheld by the CJEU in its FENIN judgment of 11 July 2006.[37]

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 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."[38]

In a subsequent judgment given on 12 July 2012 in the Compass case, the CJEU has confirmed the approach taken in the FENIN and SELEX cases.[39]

2.1.5 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,[40] 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 – irrespectively of the subsequent use made of the products or services by the contracting authority.

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37 Judgment of the CJEU in Case C-205/03 P, *FENIN* v *Commission*, para. 26.

38 Judgment of the CJEU in Case C-113/07, P *Selex* v *Commission*, of 26 March 2009, para. 102.

39 Judgment of the CJEU in Case C-138/11, *Compass-Datenbank GmbH* v *Republik Österreich*, para. 38. The notion of economic activity has recently been addressed by the CJEU from a more general perspective in its judgment in Case C-185/14, EasyPay, of 22 October 2015.

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

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 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.[41] 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 section, we will have a brief look at the provisions of competition law governing long term distribution agreements and joint purchasing as well as abuse of a dominant position. These provisions of competition law are applicable as long as the goods and services procured subsequently are used for economic activities and not exclusively for the exercise of public powers.

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

2.2 What Kind of Behaviour by Contracting Authorities When Procuring may Infringe EU Competition Law?

2.2.1 Long term exclusive purchase agreements which may infringe EU 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.[42]

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 %.

However, Article 5 (1) of the Vertical Block Exemption Regulation[43] 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 lim-

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42 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.

43 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.

> iting 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."[44]

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's 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 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." [45]

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 authority 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 2.1.4 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),

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

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

procurement is exempted from competition law under the FENIN/SELEX case law of the CJEU.

2.2.2 Joint purchasing/procurement agreements and buyers' cartels which may infringe EU competition law

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

> "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 purchases, 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."[46]

In its Horizontal Guidelines published in 2011, the European Commission provides guidelines as to how joint purchasing is to be treated under competition law.[47] 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

[46] The document "Examples of competition problems related to public procurement proceedings" ("Exempel på konkurrensproblem vid upphandlingar") was published on the Swedish Competition Authority's homepage on 24 August 2007.

[47] 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, 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 book on "*Strategisk offentlig upphandling*" written by David Braic, Magnus Josephson, Christoffer Stavenow and Eva Wenström (Jure Förlag AB, 2012).

'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."[48]

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 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."[49]

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 realization of economies of

[48] 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.

[49] 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.

> scale. However, such an obligation has to be assessed in the context of the individual case."[50]

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.

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 2.1.4 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.

2.2.3 Discrimination between suppliers which may constitute an abuse of a dominant position

If a contracting authority holds a dominant position on a certain buyer market, and is found to abuse such a dominant position, the contracting authority

[50] 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.

could be punished with fines ranging up to 10 % of an undertaking's turnover. However, as set out in section 2.1.4 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 – including an abuse of a dominant position – under the FENIN/ SELEX case law of the CJEU.

Article 102 of the Treaty of the Functioning of the European Union (which corresponds to Chapter 2, Article 7 of the Swedish Competition Act) stipulates as follows:

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> **(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;**
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." (emphasis added)

The type of abuse most likely to be relevant in a procurement context is probably abuse of a dominant position by discrimination, which is defined as applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

To the author's knowledge, no Swedish contracting authority has until now been fined for any abuse of a dominant position related to public procurement. Below, follow therefore two examples of how abuse of a dominant position by discrimination has been found by Swedish Courts outside the area of public procurement.

> *The SAS/Luftfartsverket Case of 2002*
>
> One of the most interesting judgments in Sweden as to abuse by a dominant position by discrimination is the SAS v Luftfartsverket case. On 27 April 2001, the Göta Court of Appeal ruled that Luftfartsverket, the Swedish authority in charge of civil aviation, had abused its dominant position by discriminating against SAS which had to pay higher fees than its competitors for using a specific terminal at the Stockholm Arlanda airport.[51]. The Göta Court of Appeal found that the abuse

[51] Judgment of the Göta Court of Appeal in Case T 33-00, *Staten genom Luftfartsverket* v *Scandinavian Airlines System*. The parties submitted legal opinions from three professors in competition law: Erik Nerep at the Stockholm School of Economics, Nils Wahl at Stockholm University and Jean-François Bellis, professor at the University of Brussels and Partner at the leading EU competition law firm Van Bael & Bellis law in Brussels. The author of this article

by Luftfartsverket entailed nullity, which meant that as a result of the judgment, SAS was reimbursed for payments of fees and was liberated from future fees to an overall amount of more than EUR 100 million. The judgment was appealed to the Swedish Supreme Court, which on 12 November 2002 decided not to grant a leave of appeal.[52]

The Arlanda Taxi Case of 201053
This case was investigated by the Swedish Competition Authority upon complaint by a number of small taxi enterprises and finally decided by the Swedish Market Court. The case concerned the planned change of structure regarding taxi-lanes at Sweden's largest airport, the Stockholm Arlanda Airport. The three largest taxi companies in Stockholm would – after the planned change outside Terminal 5 – have four out of five taxi-lanes and the other, smaller companies, would have to share only one lane between them. The Swedish Competition Authority issued an interim injunction decision against Luftfartsverket (the Swedish Aviation Authority) obliging the latter not to go ahead with these changes as the Authority's preliminary investigation indicated that the effect of the planned changes would amount to an abuse of a dominant position by means of discrimination.[54] The Swedish Market Court upheld the interim decision taken by the Swedish Competition Authority. This case constitutes a rare example of the Swedish Competition Authority intervening to protect small and medium-sized companies from abuse of a dominant position by a large undertaking.

However, the large practical problem for anyone wanting to bring a case of abuse of a dominant position by a contracting authority to court, is that it generally is very difficult to prove the existence of a dominant position, as it generally requires in-depth and very costly economic analysis and the legal procedure normally takes several years. Moreover, it is the claimant which bears the full burden of proof not only of proving an abuse but also of proving what the relevant market is and that there is dominance on this legal market.[55] This may explain why competition authorities such as the Swedish Competition Authority as well as DG Competition of the European Commission bring up much fewer cases of abuse of a dominant position than cases concerning cartels and other types of anti-competitive cooperation. Therefore, from the perspective of a supplier which considers that it has been discriminated against in a public procurement proceeding, it is generally very much preferable to initiate a judicial review procedure under public procurement law invoking a breach

at that time served as associate at Van Bael & Bellis and assisted professor Jean-François Bellis in this matter.

52 Decision of the Swedish Supreme Court in Case T 2137-01.

53 Decision of the Swedish Market Court of 5 February 2010, MD 2010:5.

54 Decision of the Swedish Competition Authority of 23 October 2009, file ref. 542/2009. The Swedish Competition Authority's investigation in this case was led by the author of this article, at that time Senior Case Officer at the Swedish Competition Authority.

55 For a recent example, see the judgment of the Swedish Patents and Market Court in Case 16599-15, *Net at Once Sweden AB* v *Göteborg Energi GothNet AB*, of 2 February 2018.

of the principle of equal treatment compared to bringing up a case of abuse of dominant position under competition law invoking abuse by discrimination.[56]

2.3 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 Chapter 20, Article 17 of the New LOU of 2017, 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 Patent and Market Court.[57]

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 anticompetitive 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

[56] See the article "Konkurrensrättens inverkan på offentliga upphandlingar" written by the former chief legal officer of the Swedish Competition Authority Per Karlsson and published in *Upphandlingsrättslig Tidskrift* (2018), Vol. 3, 107, p. 109.

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

overriding horizontal agreement being void. In an article published more than 15 years ago in Europarättslig Tidskrift, the author of the present article argued that this should be the case under certain circumstances.[58]

3. PUBLIC PROCUREMENT IMPACT ON THE APPLICATION OF EU COMPETITION LAW: NEW PRINCIPLE OF CONTRACTING AUTHORITY REDUCED COMPETITION EXCLUDING INFRINGEMENT BY OBJECT

According to Article 101 TFEU all agreements between undertakings … which may affect trade between Member States and which have as their *object* or *effect* the prevention, restriction or distortion of competition within the internal market shall be prohibited as incompatible with the internal market.

In theory, it does not matter if an agreement has an anti-competitive object or an anti-competitive effect, in both situations the contracting parties could theoretically be liable to high fines for anti-competitive cooperation. In practice, however, it is much more difficult for competition authorities to bring up cases concerning anti-competitive effect compared to cases concerning anti-competitive object. The reason is that in order to prove anti-competitive effect, it is generally necessary to make an in-depth, costly and time-consuming economic analysis, which is not necessary if the competition authority can prove an anti-competitive object. To the author's knowledge, the Swedish Competition Authority has so far never managed to impose a fine for any cooperation which just has an anti-competitive effect but no anti-competitive object. One example of agreements generally having an anti-competitive object is cooperation between competitors as to current and future prices, such as bid-rigging and other cartels. However, an agreement which at first sight looks like a cartel, may, after it has been put into its economic and legal context, have such special features that it on second sight cannot be regarded as an infringement by object. This does not automatically mean that the agreement is legal as the competition authority, in theory, still can go ahead and try to prove anti-competitive effects. However, in practice, a finding that a certain practice does not constitute an infringement by object, will very probably lead to the case being dropped as anti-competitive effects are so difficult and costly to prove.

[58] 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.

The following two sections contain two recent Swedish cases decided by the Swedish Patents and Market Court of Appeal, where the specific design of a public procurement proceeding has led to the conclusion that the co-operation between suppliers which normally would have been regarded as a serious infringement by object cannot be regarded as constituting an infringement by object when put into its economic and legal context, due to the specific design of the public procurement proceeding.

3.1 The Aleris Clinical Physiology Services Case of 2017 – Swedish Patent and Market Court of Appeal[59]

In its judgment of 18 December 2015, the Stockholm District Court imposed fines on the undertakings Aleris Diagnostik AB, Capio S:t Göran Sjukhus AB and Hjärtkärlgruppen i Sverige AB of 25.3 MSEK, 1.1 MSEK and 2,1 MSEK respectively, for anti-competitive cooperation related to a public procurement proceeding concerning clinical physiology services conducted by the County of Stockholm. One of the legal arguments raised by some of the undertakings before the Stockholm District Court was that they lacked capacity to submit tenders on their own without cooperation with the other undertakings at hand.

The Stockholm District Court found that the undertakings did not fulfill the burden of proof to show that there was a lack of capacity which made it objectively necessary to cooperate in the way at hand.

The judgment of the Stockholm District Court was appealed to the Swedish Patent and Market Court of Appeal. In its landmark judgment of 28 April 2017, the Swedish Patent and Market Court of Appeal annulled the judgment of the Stockholm District Court. However, the issue of whether the Swedish Competition Authority or the parties have the burden of proof for proving that the parties had the capacity, respectively not the capacity to submit tenders on their own – was not at all subject to analysis in the judgment of the Swedish Patent and Market Court of Appeal. The reason for this is that the Swedish Patent and Market Court of Appeal ruled out that the cooperation could be regarded as an infringement by object irrespectively of whether there was a lack of capacity or not, by looking at the cooperation in its economic and legal context, as follows from the following quote:

> "The Swedish Patent and Market Court of Appeal notes that the agreements were entered into before a public procurement proceeding, where the buyer of the services had almost a de facto monopoly (a so called monopsony). Moreover, the Court notes that the buyer had decided that the lowest price should be the sole evaluation criterion in the procurement and that only a limited number of suppliers were to be

[59] Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 7497-16 on 28 April 2017.

appointed. At the time of entering into the agreements, the parties to the agreements could not be sure to supply any services at all, instead they risked having to leave the market.

It is true that the fact that the county had decided that only a limited number of service suppliers could be appointed could have led to the assumption that only those undertakings that could offer a relatively high supply capacity would have a chance to win the procurement proceeding. However, the fact that price was the only evaluation criterion meant, as the Stockholm District Court has pointed out, (p. 183), that the county had no legal way to favour suppliers with a high supply capacity. A supplier having offered a low price therefore could not on legal grounds be disregarded based on its limited supply capacity.

There is no evidence neither in the agreements nor in what has become known concerning the contacts between the parties to prove that certain specified volumes of the services in question have been shared between the undertakings in such a way that certain parts have been assigned to the contracting parties.

The limitation to 50 % of the possibility to become subcontractor which is in Aleris' agreement with Capio cannot either be regarded as a partitioning of a given volume which is comparable to market sharing in the meaning set out above. From the "Invitation to tender" it follows explicitly that "The County of Stockholm does not offer any guarantees as to service volume". The fact that the procurement documents contained a volume prognosis "not binding for the County of Stockholm" concerning services purchased divided per object during the year 2007 (see request for tender paragraph 1.2) does not change the situation.

Against this background, the mentioned contract clauses can be said to constitute a conditional obligation on one of the parties upon request to appoint the other party as a subcontractor concerning a non-defined quantity of potentially won services and thereby provide access to the market. The question at hand is whether such an agreement can be said to belong to the category of cooperation which is so harmful to competition that no analysis of any potential anti-competitive result needs to be done.

An essential point of departure for assessing the agreements is, as mentioned above, that the county in principle was the only buyer of the health care services in question and that the possibility for suppliers to be active on this market was decided by way of public procurement every few years. Keeping several potential suppliers between the occasions for procurement can in such a situation to a certain degree be pro-competitive, because undertakings which are knocked out from the market are unlikely to participate in future procurement proceedings. Moreover, certain types of cooperation related to procurement proceedings may be both useful and to the benefit of the buyer.

As to the clause on volume limitation, it follows from the email conversation at hand in the case (see the judgment of the Stockholm District Court, p. 155–158) how it was incorporated in the agreement between Aleris and Capio. From the interrogation with E.T. it follows that Capio wished to limit the volume to the subcontractor because Capio could not refrain from all of the potential volume to Aleris, as Capio needed to effectuate also so called referral examinations at S:t Görans hospital. Furthermore, it follows from the witness examination that the volume of examinations the clinic would obtain from the hospital was not sufficient to maintain the staff's necessary competence.

As to the fact that the undertakings agreed to submit tenders with maximum volume for services previously provided by the undertakings and a minimum

obligation for Capio concerning sleep apnea examinations, it has not led to a reduction of uncertainty as to how the undertakings would act on the market in way which could impair competition. The situation would have been different if the agreements had amounted to limitations on the undertaking when submitting tenders. In that case the practice could have been characterized as a market sharing cartel, where the number of competitors was limited leading to higher prices and worse quality.

Considering these circumstances and as no specific volumes have been shared between the parties, the agreements between the parties cannot in view of existing case law be considered to have the object to limit competition."[60] (author's translation and emphasis)

3.2 The Telia/GothNet Data Communication Services Case of 2018 – Swedish Patent and Market Court of Appeal[61]

In its judgment of 21 December 2016, the Swedish Patent and Market Court at the Stockholm District Court imposed fines on Göteborg Energi GothNet and TeliaSonera Sverige AB of 8 MSEK each for anti-competitive information exchange related to a public procurement proceeding. In 2009, the City of Göteborg had conducted a public procurement proceeding concerning data communication services. The Swedish Patent and Market Court found that TeliaSonera had informed Göteborg Energi GothNet that it would not submit a tender on its own in the public procurement proceeding, while TeliaSonera conducted negotiations with the aim to become a subcontractor to Göteborg Energi GothNet.

One of the objections raised by the parties, was that Göteborg Energi GothNet had not taken this information into consideration when designing its tender. In this regard the Swedish Patent and Market Court reasoned as follows:[62]

"*Evaluation and assessment of evidence*
TeliaSonera's objection that it was not any longer present on the market relies on circumstances which the Swedish Patent and Market Court has dismissed, namely that TeliaSonera did not have the capacity and that the definition of the relevant market argued by the Swedish Competition Authority should be wrong. TeliaSonera thus remained on the market, as well as GothNet.

Also unilateral disclosure of information to a competitor can constitute a concerted practice. Spreading sensitive information removes the uncertainty concerning a competitor's future actions and thus affects, directly or indirectly, the strategies adopted by the recipient of the information. (Comap, reference above).

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60 Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 7497-16, p. 12–14.

61 Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 761-17, *Telia*, on 13 February 2018.

62 Judgment of the Swedish Patent and Market Court in Case PMT 17299-14, *Telia/GothNet*, on 21 December 2016. The author served as one of GothNet's legal advisors in this matter.

> It is therefore GothNet and TeliaSonera which are to submit evidence showing that they have not acted with regard taken to the information obtained.
>
> Firstly, the objection that the information came in such a late phase that it lacked value, has to be dismissed. GothNets argument in this regard is based on the condition that the information was conveyed end of August 2009, whereas the Court has found that the information in reality was conveyed end June 2009 and thereafter was confirmed several times. Form end of June to the last day to submit a tender, the 25 August 2009, almost two months passed by. GothNet therefore had ample time to act on the basis of the information in question.
>
> In order to rebut the presumption that GothNet took the information in consideration when determining its market behaviour, GothNet needs to explain in a credible manner why the information lacked importance for its actions. The Court does not question that GothNet expected additional competing tenders while being eager to submit a competitive tender in order to keep the City of Göteborg as its customer. However, what constitutes a competitive offer depends on how many suppliers participate in a public procurement proceeding and which market position these competitors have. As a consequence of the concerted practice, GothNet knew that the strongest competitor TeliaSonera would not participate, but instead had the ambition to function as GothNet's subcontractor. GothNet had incentives to adopt its tender to the information received.
>
> In addition to this, GothNet did request the information to be confirmed, which TeliaSonera also did within the framework for those draft declarations of intent and cooperation agreements which were exchanged during summer 2009.
>
> As already has been noted, TeliaSonera used the information in order to get a better position in the negotiations with Gothnet concerning a subcontractor agreement.
>
> The presumption of a subsequent market behaviour therefore has not been rebutted."[63]

While GothNet decided not to appeal the judgment, TeliaSonera appealed the judgment of the Swedish Patent and Market Court at the Stockholm District Court to the Swedish Patent and Market Court of Appeal. In its judgment of 13 February 2018, the Swedish Patent and Market Court of Appeal annulled the judgment of the Swedish Patent and Market Court. However, the issue of whether the Swedish Competition Authority or the parties have the burden of proof for proving that the parties had the capacity, respectively not the capacity to submit tenders on their own – was not at all subject to analysis in the judgment of the Swedish Patent and Market Court of Appeal. The reason for this is that the Swedish Patent and Market Court of Appeal, following the path taken in the *Aleris Clinical Physiology Services Case* analysed above, ruled out that the cooperation could be regarded as an infringement by object irrespectively of whether there was a lack of capacity or not, by looking at the cooperation in its economic and legal context, as follows from the following quote:

[63] Judgment of the Swedish Patent and Market Court in Case PMT 17299-14, *Telia/GothNet*, on 21 December 2016, p. 116–117.

"The first part of the analysis is thus whether the practice at hand *prima facie* is of such a nature that it is capable of restricting competition. When carrying out this analysis, it should be borne in mind that the scope considering a cooperation to constitute a restriction by object is narrow.

In the case at hand, Telia's information meant that GothNet was informed that a potential buyer did not want to compete for the contract which was to be awarded to the supplier offering the lowest price.

Even if GothNet was uncertain as to how other potential competitors would act, the information from Telia was of such a nature that it *prima facie* was capable of restricting competition, even if it possibly was known that Telia rarely wins public procurement proceeding on the basis of the lowest price.

The next step in the assessment of whether a practice has the object to restrict competition is to take account of the legal and economic context in which the practice has taken place. However, this analysis must not become so comprehensive that it in reality turns into such an analysis which has to be carried out when assessing whether the practice has resulted in a restriction of competition.

The competition rules in the TFEU and the Swedish Competition Act aim at preventing behaviour and practices by undertakings on markets which otherwise are functioning and where the conditions for competition are not hampered by, e.g., public regulations (compare Article 1 of the Swedish Competition Act). It follows from the case law of the CJEU that if other legislation leads to a legal framework which makes it impossible for undertakings to act competitively, competition rules are not applicable at all. …

The legal and economic background consists of a public procurement proceeding where the contracting authority, the City of Göteborg, had included specific mandatory requirements. According to Telia's own assessment it would have been difficult for Telia to fulfil these requirements, both due to technical and business reasons. Also representatives for GothNet considered that it would have been difficult for Telia to win the procurement proceeding. The Swedish Patent and Market Court of Appeal finds that the requirements in the public procurement proceeding were designed in such a way that they made it highly difficult for Telia to effectively compete for the services in question, this applies in particular to the requirement to expand fiber connections to addresses where GothNet already had cable in place. Moreover, it follows from the evidence at hand in the case, *inter alia* from what witness D.G. has said, that it is difficult for undertakings not affiliated with the municipality to win a municipal public procurement proceeding concerning data communication where there already exists an installed municipal network.

In the case at hand, the legal framework surrounding the public procurement proceeding has not made it impossible to act competitively, which means that that the competition rules are applicable in principle. **However, those conditions for effective competition which were in place in practice constitute a part of the factual conditions on the market and therefore are part of the economic and legal context which has to be taken into consideration when assessing whether there is an infringement by object. As stated above, the City of Göteborg has by adopting the conditions in the procurement documents made it much more difficult for Telia to compete for the services in question. The City has therefore to a significant degree hampered the conditions for effective competition in the public procurement proceeding.**

As a result of this assessment and with regard to the narrow scope the notion of object has according to Article 101.1 TFEU and in the case law of the CJEU,

> **the Stockholm District Court finds that Telia's transfer of information to GothNet cannot be regarded as having had the object to restrict competition, because competition was restricted by the requirements in the public procurement proceeding. Therefore, Telia cannot be regarded as having infringed Chapter 2, Article 1 of the Swedish Competition Authority or Article 101.1 TFEU without the need to carry out a closer assessment of the practice's potential effects on competition.**
>
> No other assessment is possible when applying the corresponding rules in the Swedish Competition Act. It is therefore necessary to assess whether the transfer of information resulted in a restriction of competition."[64] (author's translation and emphasis)

In the landmark judgment in the *Aleris Clinical Physiology Services Case of 2017*, the Swedish Patent and Market Court of Appeal thus established a new principle when assessing whether a cooperation between tenders related to a public procurement proceeding is to be regarded as having an anti-competitive object, when considering the economical and legal context. If competition in a public procurement proceeding is hampered by the way the contracting authority has designed it, cooperation between suppliers that would normally constitute an infringement by object cannot be regarded as infringement by object – because the reduction of competition induced by the contracting authority has to be taken into consideration when putting the cooperation in its economic and legal context. It is proposed that the new principle established by this judgment can be called the principle of contracting authority reduced competition excluding infringement by object. This new principle has been confirmed by the Swedish Patent and Market Court of Appeal in its judgment in the *Telia/GothNet Data Communication Services Case of 2018*.[65]

[64] Judgment of the Swedish Patent and Market Court of Appeal in Case PMT 761-17 on 13 February 2018, *Telia*, p. 11–13.

[65] For an in-depth and considerably more critical analysis of the judgments of the Swedish Patents and Market Court of Appeal in the *Aleris Clinical Physiology Services Case* and the *Telia/GothNet Data Communication Services Case*, see Trine Osen Bergqvist, "The winner does not take it all. Swedish Court of Appeal says co-operation between competing bidders is not restrictive by object", E.C.L.R. (2019), 40 (4), 141.

4. COMPETITION IMPACT ON PUBLIC PROCUREMENT INDIRECTLY THROUGH THE PRINCIPLE OF PROPORTIONALITY

4.1 Competition aspects on barriers to entry for newly created undertakings

4.1.1 The Recruitment Services Case of 2008 – Göteborg Administrative Court of Appeal[66]

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 completed financial years were allowed to participate in the procurement proceeding.

As to this requirement, the Göteborg Administrative Court of Appeal explicitly took the potential effects on competition in consideration when stating:

> "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."[67] (author's translation and emphasis)

4.1.1.1 The School Transport Case of 2009 – Göteborg Administrative Court of Appeal[68]

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

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

67 Page 7 of the judgment.

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

proceeding is not limited more than necessary has to be taken into consideration."[69] (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. This judgment thus constitutes another good example for a court explicitly including competition aspects when applying the principle of proportionality.

4.1.1.2 The Safety Vest Case of 2012 – Stockholm Administrative Court of Appeal[70]

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.

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

4.2.1 The SIDA Legal Services Case of 2012 – Stockholm Administrative Court[71]

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.

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[69] At p. 2–3 of the judgment.

[70] 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.

[71] 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.

4.3 Competition aspects concerning the object of the procurement proceeding itself

4.3.1 The Suture Case of 2010 – Supreme Administrative Court[72]

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 procured products must not contain triclosan) infringed the principle of proportionality.

The Jämtland Administrative Court rejected the complaint.[73] 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.[74] 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 (former LOU of 2008 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."[75] (author's translation)

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72 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.

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

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

75 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.

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.

4.3.2 The Invisible Light Case of 2011 – Sundsvall Administrative Court of Appeal[76]

The Swedish Transport Administration (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.[77] On appeal to the Sundsvall Administrative Court of Appeal, the Swedish Transport Administration referred to a legal opinion issued by jur.dr. Andrea Sundstrand, according to which the Swedish Transport Administration 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.[78] 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.

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

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

[78] 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.

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

In its Suture case precedent,[79] the Swedish Supreme Administrative 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 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 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.

5. COMPETITION IMPACT ON PUBLIC PROCUREMENT INDIRECTLY THROUGH THE PRINCIPLE OF EQUALITY

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

5.1.1 The Fabricom Case of 2005 – Court of Justice of the European Union[80]

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."[81]

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:

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[79] 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.

[80] Judgment of the CJEU in Case C-21/03 and C-34/03, *Fabricom* v *Belgium* (2005) ECR I-1559.

[81] Para. 12 of the judgment.

> "[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*."[82] (emphasis added)

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.

5.1.2 The Sprinkler Case of 2010 – The Stockholm Administrative Court of Appeal[83]

The Municipal Housing Company of Uppsala 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.

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82 Para. 47 of the judgment.

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

5.1.3 The Pension Insurance Case of 2011 – Sundsvall Administrative Court of Appeal[84]

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

5.2 Competitive advantage to certain tenderers related to approximative size criteria

5.2.1 The Table-top Case of 2009 – Göteborg Administrative Court of Appeal[85]

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.

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

[85] 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.

5.2.2 The Food Supply Case of 2012 – Göteborg Administrative Court[86]

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

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

An infringement of the principle of equality generally also 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.**"[87] (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 applica-

[86] 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.

[87] Opinion of AG Tesauro in Case C-63/89 *Assurances du Crédit* (at 1829).

tion of the principle of equality – similarly as the proportionality principle does, but with a *purposive orientation*."[88]

6. COMPETITION IMPACT ON PUBLIC PROCUREMENT DIRECTLY THROUGH THE FRAMEWORK AGREEMENT RELATED COMPETITION PRINCIPLE ENACTED IN THE FORMER CLASSICAL SECTOR DIRECTIVE OF 2004

6.1 Introduction to the Framework Agreement Related Competition Principle stipulated by Art 32 (2) of the Former Classical Sector Directive of 2004

As to competition aspects of framework agreements, Article 32 (2) of the Former Classical Sector Directive of 2004 stipulated 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.

6.2 The Application of the Framework Related Competition Principle on Too Long Framework Agreements

6.2.1 Swedish and EU law on too long framework agreements

The provisions of Article 32 (2) of the Former Classical Sector Directive of 2004 were implemented into Swedish law by the Former LOU of 2008 Chapter 5, Article 3 which stipulated:

> "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.

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[88] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Oxford and Portland, Oregon, Hart Publishing, 2011), p. 214.

6.3 Swedish case law on too long framework agreements

6.3.1 The Vaccination Case of 2011 – Stockholm Administrative Court of Appeal[89]

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 agreement would thus be 4 years and six months, i.e. six months longer than the four years stipulated in Chapter 5, Article 3 of the Former LOU of 2008 [90] 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**."[91] On these grounds, the Court decided that the public procurement proceeding should be redone.

6.3.2 The Insurance Case of 2011 – Karlstad Administrative Court[92]

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.

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89 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.

90 This provision now constitutes Chapter 7, Article 2 of the New LOU of 2008.

91 Page 12 of the judgment.

92 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).

6.3.3 The SharePoint Case of 2012 – Malmö Administrative Court[93]

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 at that time was no explicit upper limit to the duration of framework of agreements in the Former Utilities Directive of 2004 nor in the Former LUF of 2008, but that the provisions of a maximum time duration of four years stipulated by LOU could be taken as a point of departure when 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 the Former LUF of 2004 Chapter 1, Article 24".[94] (author's translation, emphasis added) On these grounds, the Court decided that the public procurement proceeding had to be redone.

It should be noted that this case would have been decided differently today. As of 1 January 2017, Chapter 7, Article 2 of the New LUF explicitly stipulates that framework agreements in the classical sector are allowed for a duration of eight years, i.e., twice as long compared to framework agreements in the classical sector.

6.3.4 Conclusions from the Swedish case law on too long framework agreements

It follows from Swedish case law that framework agreements in the classical sector 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.[95] Moreover, it appears that it is quite difficult for contracting authorities to prove this.

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[93] 59 Judgment of the Malmö Administrative Court in Case 3065-12 E, *Bouvet Syd AB* v *VA SYD*, of 4 May 2012.

[94] Page 7 of the judgment.

[95] As set out in the preceding section, in the utilities sector, framework agreements may have a

6.4 The Application of the Framework Related Competition Principle on Too Large Framework Agreements

6.4.1 Swedish and EU law on too large framework agreements

As mentioned above, Article 32 (2) of the Former Classical Sector Directive of 2004 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 former Classical Sector Directive of 2004.

Whereas the provisions of Article 32 (2) of the Former Classical Sector Directive of 2004 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 relevance for too large frameworks, i.e. the duty not to restrict competition, were never explicitly implemented into the Former Swedish Public Procurement Act – LOU – of 2008.

However, it follows from the preparatory works that the Swedish legislator intended that also the provisions concerning the duty not to restrict competition embodied in Article 32 (2) of the Former Classical Sector Directive of 2004 should be applicable in Swedish law.

The preparatory works 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**."[96] (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 Former Classical Sector Directive of 2004 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 followed from the general principles of public procurement listed in the Former LOU of 2008 Chapter 1, Article 9.[97] In view of the Council's opinion, the Swedish legislator decided

duration of eight years, a longer duration than eight years is only allowed if the contracting authority can prove special reasons.

96 Prop. 2006/07:128, p. 172.

97 Prop. 2006/07:128, p. 333.

not to include any explicit provision concerning provisions of Article 32 (2) of the former Classical Sector Directive of 2004 as to the duty not to restrict competition. However, at the same time it also clearly follows from the preparatory works that the Swedish legislator intended to give full effect to these provisions.

6.4.2 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.[98]

The legal ground for central purchasing bodies was Article 11 of the former Classical Sector Directive of 2004, 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 (Chapter 2, Article 9 a of the Former LOU of 2008[99]).

Government authorities are requested to use a specific central purchasing body, the Statens inköpscentral at Kammarkollegiet,[100] for procurements to the extent stipulated by Articles 2–4 in the Swedish Decree on Co-ordination of Purchases by Government Authorities:[101]

> "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."

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98 For an overview over central purchasing authorities in the EU, see the OECD (2013) study on "Organising Central Public Procurement Functions", *Sigma Brief 26*, available on http://www.sigmaweb.org/publications/Brief26_CentralPPFunctions_2013.pdf. 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.

99 This provisions now constitutes Chapter 7, Article 10 of the New LOU of 2017.

100 www.avropa.se is the website of Statens inköpscentral at Kammarkollegiet.

101 Förordning (1998:796) om statlig inköpssamordning.

The Swedish Association of Local Authorities and Regions (Sveriges kommuner och landsting, SKL) operate a central purchasing body called SKL Kommentus Inköpscentral AB.[102] 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.

6.4.3 Why too large framework agreements can be bad for competition

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."

The adverse effects of too large framework agreements have been described very well in an opinion written by the Swedish Federation of Business Owners as follows:

> "The Swedish Federation of Business Owners 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. …
>
> The Swedish Federation of Business Owners would like to point out in this regard that it follows from the directive in the classical sector as well as from the preparatory works to LOU that a contracting authority may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. The Swedish Federation of Business Owners considers that an explicit provision in this respect should be added into the Swedish Act on Public Procurement. The point of departure for the Swedish Federation of Business Owners is that as a rule, every

[102] www.sklkommentus.se/inkopscentral is the website of SKL Kommentus inköpscentral.

> 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." (author's translation and emphasis)

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.[103]

6.5 Case Law on Too Large Framework Agreements

6.5.1 The Children Dental Care Case of 1999 – Supreme Administrative Court[104]

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[105] as to the **obligation to conduct procurement proceedings in a way which utilizes**

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[103] Mats Bergman, Johan Y. Stake, och Hans Christian Sundelin Svendsen, *Samordnade ramavtal – en empirisk undersökning*, Report 2010:5 published on the website of the Swedish Competition Authority: http://www.konkurrensverket.se/globalassets/publikationer/uppdragsforskning/forsk_rap_2010-5_samordnade_ramavtal.pdf

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

[105] Chapter 1, Article 4, first paragraph, of the former Swedish Public Procurement Act of 1993, Lag (1992:1528) om offentlig upphandling, stipulated as follows: "Procurement proceedings

> **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.[106]

6.5.2 The Nursing Home Case of 2009 – Göteborg Administrative Court of Appeal[107]

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 Procurement 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 [the Former] LOU [of 2008] 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.**"[108] (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. Neverthe-

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shall be conducted in a way which makes use of the existing possibilities for competition and in a businesslike way."

[106] 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.

[107] 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.

[108] 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.

less, 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.

6.5.3 The Skåne Postal Services Case of 2011 – Göteborg Administrative Court of Appeal[109]

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 principle of proportionality. The Göteborg Administrative Court of Appeal in this respect upheld the prior judgment by the Administrative District Court of Malmö.[110] 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.[111]

6.5.4 The SKL Kommentus Printer and Copying Machines Case of 2012 – Legal opinion of the Swedish Competition Authority[112]

SKL Kommentus Inköpscentral AB conducted a joint public procurement procedure concerning printers and copying machines. The framework agreement

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

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

[111] 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.

[112] 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 at that time, Dan Sjöblom.

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[113] 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"[114]

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 former Classical Sector Directive of 2004:

> "The Swedish Competition Authority considers that the general clause contained in Article 32 (2) fifth subparagraph of the [Former] Classical Sector Directive [of 2004] 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 [the Former] LOU of 2008 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 facing the risk of vanishing from the market in question, could be subject to intervention by administrative

[113] The case number at the Stockholm Administrative Court is 1857-12. The judgment of the Stockholm Administrative Court is presented in the next subsection.

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

> courts of appeal under Article 32 (2) fifth subparagraph of the [Former] Classical Sector Directive [of 2004] even if the general principles of public procurement under [the Former] LOU of 2008 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 [Former] Classical Sector Directive [of 2004], 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."[115]

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.[116] Here, the Göteborg Administrative Court of Appeal, in view of the author (who served as one of three judges in the case), rightly found that none of the general principles referred to in the former LOU of 2008 Chapter 1, Article 9 imposed any obligation on a contracting authority to consider such *long-run* effects on competition which may materialize 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 Former Classical Sector Directive of 2004 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 Former 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 effect to provisions in the directives.

As to the duty not to restrict competition under Article 32 (2) of the Former Classical Sector Directive 2004 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 being given the possibility to compete for supplies at different times during these four years.

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

[116] 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.

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 numbers 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 [former] Classical Sector Directive [of 2004]."[117]

6.5.5 The SKL Kommentus Printer and Copying Machines Case of 2012 – Judgment of the Stockholm Administrative Court[118]

The Stockholm Administrative Court applied the reasoning of the legal opinion issued by the Swedish Competition Authority on the facts of the case as follows:

"Undue restriction of competition
Toshiba has argued that by awarding the contract to only one supplier in spite of the procurement including a very large number of municipalities, counties and companies all over the country, SKL Kommentus Inköpscentral has foreclosed competition on the market for printers and photocopying machines under long time, which will unduly restrict competition on the market.

The public procurement proceeding at hand includes a large number of contracting authorities and entities. However, the procurement has been divided into 21 smaller lots and it has been possible for each supplier to tender for each lot separately. Moreover, the volume of the procurement proceeding is rather limited. The Administrative Court finds that Toshiba has not proven that the procurement proceeding has been handled in such a way that it has or risks having such consequences that it restricts competition in a way which is contrary to the provisions of LOU."[119]

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

[118] Judgment of the Stockholm Administrative Court in Case 1857-12, *Toshiba TEC Nordic AB* v. *SKL Kommentus Inköpscentral*.

[119] Judgment of the Stockholm Administrative Court in Case 1857-12, *Toshiba TEC Nordic AB* v. *SKL Kommentus Inköpscentral*, *p. 16–17.*

6.5.6 The One Med Case of 2014 – Stockholm Administrative Court[120]

SKL Kommentus Inköpscentral conducted a public procurement proceeding concerning medical consumables which was challenged by OneMed before the Stockholm District Court. One of the legal grounds for the judicial review was that the procurement proceeding because of its size – covering up to 619 potential contracting authorities – would limit competition contrary to Article 32 (2) fifth subparagraph of the Former Classical Sector Directive of 2004. The Stockholm District Court implicitly gave direct effect to this provision and applied it on the facts of the case as follows:

> "The Stockholm District Court considers that the facts of the case do not prove that the procurement proceeding has been conducted in a way that competition is limited or risks being limited in a way which is contrary to the basic principles of public procurement."

6.5.7 The Tigérs Case of 2014 – Göteborg Administrative Court of Appeal[121]

On 14 March 2014, the Göteborg Administrative Court of Appeal gave judgment in the *Tigérs* Case, dismissing a request for judicial review of a public procurement proceeding concerning carpet fitting services. This judgment is very interesting as it is, to the author's knowledge the only occasion so far, that a Swedish administrative court of appeal *explicitly* gave direct effect to the framework related competition principle contained in Article 32 (2) of the Former Classical Sector Directive of 2004. The Göteborg Administrative Court of Appel stated:

> "Framework agreements may not be used in an undue way or in a way which distorts competition (Article 32(2) of the Former Classical Sector Directive of 2004), but Tigérs has not put forward any facts which would prove such a use."[122]

6.5.8 The 2016 judgment of the Finnish Supreme Administrative Court on the Framework Related Competition Principle[123]

On 17 November 2016, the Finnish Supreme Administrative Court gave judgment in the *KL-Kuntahankinnat Oy Case*. This very interesting judgment has

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120 Judgment of the Stockholm Administrative Court in Case 20882-13, *OneMed Sverige* v *SKL Kommentus Inköpscentral*, of 31 March 2014.

121 Judgment of the Göteborg Administrative Court of Appeal in Case 4816-13, *Municipality of Arvika* v *Tigérs Plattsättning/TIGBRO* and *TD Golv*, of 14 March 2014 (Judges Göran Bodin, Viktoria Sjögren Samuelsson and Sonja Huldén).

122 Judgment of the Göteborg Administrative Court of Appeal in Case 4816-13, *Municipality of Arvika* v *Tigérs Plattsättning/TIGBRO* and *TD Golv*, of 14 March 2014, p. 3.

123 Judgment of the Finish Supreme Administrative Court in Case HFD:2016:182, *KL-Kuntahankinnat Oy*, of 17 November 2016.

been analysed by Dr Kirsi-Maria Halonen in an article published on the blog "How to Crack a Nut" led by Albert Sanchez Graells as follows:

> "The tension between centralization, large framework agreements and the competition principle has as of lately been increasingly discussed by academics, but also by national legislators. The new Procurement Directive 2014/24 aims, among other objectives, to enhance SME participation in public tenders by setting out rules on the division into lots. These issues have not yet been directly addressed in the Court of Justice case law. Nevertheless, in the recent ruling KHO 2016:182, the Finnish Supreme Administrative Court (*korkein hallinto-oikeus*) enforced the principle that **"[f]ramework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition**", which is codified in s. 31(2) of the current Finnish Act on Public Contracts (*laki julkisista hankinnoista 2007/348*) and included in the recital (61) of Directive 2014/24. In this regard, the Supreme Administrative Court found that the decision to award "too-large" a framework agreement for health care and hospital supplies created barriers to bidding for most undertakings and was unduly restricting competition. It thus cancelled the decision.
> …
>
> The central purchasing body, KL-Kuntahankinnat Oy, argued in the Supreme Administrative Court that it had defined the scope of the framework agreement based on the needs of its clients. The award of the whole framework agreement to a single provider was considered to be the most economically advantageous alternative. The central purchasing body objected the claims on undue restriction of competition emphasizing that it had informed the potential bidders of the terms of the contract award in advance and encouraged them to establish consortia or sub-contracting arrangements in order to meet the requirements included in the call for tenders.
>
> The Court did not support such views and stated that the **scope of contract and the requirement of a common IT-system, logistics and customer service, was too extensive to ensure equal opportunities of economic operators to offer supplies and services. Consequently the requirements set out in the call for tenders had led to an undue restriction of competition.** According to the Court, **the possibility to rely on the capacities of others did not remove the discriminatory, disproportionate and competition restrictive features of the tender procedure. These negative effects of the framework agreement with a single provider were considered especially severe due to the length of the contract term of four years."** (emphasis added)

6.6 Has the Framework Related Competition Principle enacted in Article 32 (2) of the Former Classical Sector of 2004 been repealed by the New Classical Sector Directive or is it still valid?

In the Former Classical Sector Directive of 2004, the obligation not to use framework agreements in such a way as to prevent, restrict or distort competition was clearly stated among the Articles of the Directive, i.e., Article 32 (2).

In the New Classical Sector Directive of 2014 the obligation not to use framework agreements in such a way as to prevent, restrict or distort compe-

tition is not any longer stipulated in the Articles of the Directive. Instead, the obligation in question has moved over to the Recitals, where Recital 61 now stipulates: "Framework agreements should not be used … in such a way as to prevent, restrict or distort competition."

The question which therefore arises is whether the framework related competition principle enacted in Article 32 (2) of the Former Classical Sector of 2004 has been repealed by the New Classical Sector Directive or is it still valid in view of the equivalent provisions in Recital 61 of the New Classical Sector Directive of 2014.

6.6.1 Professor Sue Arrowsmith's book "The Law of Public and Utilities Procurement, Volume 1"

It is interesting to note that the leading professor in European Public Procurement Law, Sue Arrowsmith in the most recent edition of her book "The Law of Public and Utilities Procurement" (Volume 1, 3 rd edition, Sweet & Maxwell 2014) on p. 1178 argues that the relevant provision of Recital 61 in the New Classical Sector of 2014 can be regarded as having direct effect in the same way as the corresponding provision in Article 32 (2) of the Former Classical Sector Directive of 2004, as follows:

> "The general prohibition on using frameworks improperly or in an anti-competitive manner
> (a) General
> Article 32(2) of the 2004 Public Sector states in the final paragraph: "Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition". …
>
> This provision arguably states a relatively broad principle that in acting in the context of framework agreements contracting authorities must not act in a manner that prevents the replication in the public sector of the conditions of a competitive market. It was explained in Ch. 3 that one view of the procurement directives is that they seek more generally to ensure that regulated authorities act in such a way that the operation of a competitive private market is replicated in the public sector – although it was also suggested that the better view of the 2004 directive is that it does not have this objective. Regardless of whether this is a general objective of the directive, however, it might be argued that such a principle is applied by the directive to the specific area of framework agreements (as well as electronic auctions and dynamic purchasing systems). A narrower interpretation of the above provision in Art. 32(2) is that it is directed merely at ensuring that contracting authorities do not behave in a manner that gives rise to the kind of behavior that is controlled by the rules of competition law, including collusive behavior by economic operators (which we have suggested may present a particular risk in the context of framework agreements) or agreements that shut off competition in the market for an unreasonable period of time.
>
> An example of conduct that might be caught by this provision (even on a narrow interpretation) is the packaging of a variety of products and services not generally

offered by individual economic operators into a single framework, with an obligation to bid for the whole requirement. As suggested earlier, the provision might also, for example, catch conduct designed to circumvent the general four-year limit on framework agreements, or any conduct that simply has that effect, such as the award of unjustifiably lengthy contracts towards the end of the life of a framework.

(b) Impact of the 2014 Public Procurement Directive
The above provision is no longer included in the text of the 2014 Public Procurement Directive, but a statement of this same point is found in recital 61. **It seems likely, however, that the CJEU will also interpret the 2014 directive to apply such a prohibition against improper use, etc., in light of this statement in the recital.**"[124] (emphasis added)

6.6.2 Dorthe Kristensen Balshøj's doctoral thesis on "Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context"

In her doctoral thesis on *Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context*, Dorthe Kristensen Balshøj argues as follows:

"*Directive 2014/24/EU*
With the commencement of Directive 2014/24/EU in 2014 the clause concerning contracting authorities being prohibited from preventing, restricting or distorting competition when establishing framework agreements has been removed (in Article 33). The preparatory work for Directive 2014/24/EU only provides little information as to why.

In the proposal for Directive 2014/24/EU, COM(2011) 896 final, the clause was initially only removed as regards DPSs but concerning framework agreements the clause was still there. The Committee Report, which contained opinions from various committees, did not have any comments regarding framework agreements or DPSs, however, both the European Economic and Social Committee and the Committee of the Regions did.

Only the opinion of the Committee of the Regions addressed the specific clause by stating that 'The final sentence is unnecessary, as it follows from the principles.' This suggestion seems to have been accepted, and today the clause in only found in Recital 61 of Directive 2014/24/EU. …

Article 32(2) of Directive 2004/18/EC – Article 18 of Directive 2024/14/EU
As mentioned, the Committee of the Regions argued that the final sentence of Article 32(2) of Directive 2004/18/EC ('contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition') followed from the principles, which is why it was not reiterated in Article 33 of Directive 2014/24/EU.

[124] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, *Volume 1* (Sweet & Maxwell, third edition 2014, p. 1177–1178.

With that, the provision of Article 32(2) of Directive 2004/18/EC is today 'only' found in Recitals 61 and 49 (of Directive 2014/24/EU concerning framework agreements and innovative partnerships, respectively.

Article 18 (1) of Directive 2014/24/EU, on the other hand, sets out that 'The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.'

But does Article 18 (1) of Directive 2014/24/EU really convey the same message as Article 32 (2) of Directive 2004/18/EC?

Where Article 32 (2) of Directive 2004/18/EC only applies to framework agreements (and DPS and electronic auctions as the same wording was found in Articles 33 and 54 of Directive 2004/18/EC), Article 18 (1) of Directive 2004/18/EC seems to have broader applications as there is no limitation regarding applicability, which seems to have been the intention by making it a principle.

Evidently, the wording differs quite a bit. However, an interpretation discloses that the contents are similar, which could make Recital 61 of Directive 2014/24/EU a pleonasm as regards the repetition of the wording of Article 32 (2) of Directive 2004/18/EC.

However, as can be seen, a subjective element of 'intention' has been introduced in Article 18 (1) of Directive 2014/24/EU. Thus, where Article 32 (2) of Directive 2004/18/EC was more objective, Article 18 (1) of Directive 2014/24/EU is much more subjective in that it must be determined whether there is an element of intention. The element of intention was part of the 2011 Proposal in whose Article 15 'The design of the procurement shall not be made with the **objective** of artificially narrowing competition' (emphasis added)

Seemingly, the final version – Article 18 (1) of Directive 2014/24/EU – contains a subjective element as well as at presumption of distortion of competition, which, according to commentators, could reduce the effectiveness of the principle. Moreover, it is argued, both deviations from the Commission's initial proposal are difficult to settle with the existing case law of the CJEU.

As the wording of Article 32 (2) of Directive 2004/18/EC has been repeated in Recital 61 of Directive 2014/24/EU, this suggests that an objective approach is still preferred as regards framework agreements. [emphasis added]

Overall it must be concluded that the competition concept introduced in Article 32 (2) of Directive 2004/24/EU has been transferred to Article 18 (1) of Directive 2014/24/EU."[125]

[125] Dorthe Kristensen Balshøj's doctoral dissertation at the University of Aarhus, *Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement contex*t, p. 59–62, the author of this article participated at the disputation which took place in Aarhus on 9 March 2018.

6.7 Conclusions: The Framework Related Competition Principle enacted in Article 32.2 of the Former Classical Sector of 2004 has not been repealed by the New Classical Sector Directive, instead the Framework Related Competition Principle has been confirmed by the provisions of Recital 61 in the New Classical Sector Directive

Taking into consideration the arguments brought forward by professor Sue Arrowsmith and dr. Dorthe Kristensen Balshøj as presented above, it can be concluded that the framework related competition principle enacted in Article 32.2 of the Former Classical Sector of 2004 has not been repealed by the New Classical Sector Directive, instead the Framework Related Competition Principle has been confirmed by the provisions of Recital 61 in the New Classical Sector Directive.[126]

This view is supported by the recent legal opinion by the Swedish Competition Authority on the Judgment of the CJEU in Case C-216/17, *Coopservice*, of 27 June 2019, where the Swedish Competition Authority highlighted the duty not to use framework agreements in such a way as to prevent, restrict or distort competition, which is now stipulated by Recital 61 of the New Classical Sector Directive of 2014, when stating as follows:

> "Moreover, Recital 61 of the New Classical Sector Directive of 2014 stipulates that a framework agreement should not be used improperly or in such a way as to prevent, restrict or distort competition".[127]

7. COMPETITION IMPACT ON PUBLIC PROCUREMENT DIRECTLY THROUGH THE NEW GENERAL COMPETITION PRINCIPLE ENACTED BY THE 2014 PUBLIC PROCUREMENT DIRECTIVES

7.1 Introduction to the New General Competition Principle stipulated by Article 18 (1) of the New Classical Sector Directive

Article 18 (1) of the New Classical Sector Directive of 2014 stipulates:

> "**Principles of procurement**
> 1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

[126] See also the author's article in Upphandling 24 nr 1/2015 on "Så bör konkurrensprincipen införas i nya LOU".

[127] Legal opinion 2019:1 of 27 June 2019 on framework agreements and the principle of transparency – the judgment of the CJEU in Case C-216/17, *Coopservice*, which can be downloaded from http://www.konkurrensverket.se/globalassets/upphandling/stallningstagande/2019-1_stallningstagande-upphandling.pdf

> **The design of the procurement shall not be made with the intention of** excluding it from the scope of this Directive or of **artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.**
>
> 2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X." (emphasis added)

Similar provisions can be found in Article 36 (1), last sentence of the New Utilities Sector Directive of 2014.[128]

Article 18 (1) of the New Classical Sector Directive is implemented by Article 1-3 in Chapter 4 of the New LOU of 2017:

> **"Public procurement principles"**
> Chapter 4, Article 1
> Contracting authorities shall treat suppliers equally and without discrimination and shall conduct procurements in a transparent manner. Further, procurements shall be conducted in accordance with the principles of mutual recognition and proportionality.
>
> Chapter 4, Article 2
> **The design of a procurement shall not be made with the intention of excluding it from the scope of this Act, nor shall it be made with the intention of limiting competition so that certain suppliers are unduly favoured or disadvantaged."** (emphasis added)
>
> Chapter 4, Article 3
> A contracting authority should take environmental considerations, and social and labour law considerations into account in public procurement, if the nature of the procurement so justifies."

7.2 Overview over New Pro-competitive Provisions Introduced by the New Classical Directive of 2014

One very straightforward way of measuring the importance of competition in public procurement law is to make a search for the word "competition" in the relevant directives.

It is interesting to note that the Former Classical Sector Directive of 2004 contains the word "competition" 40 times. The New Classical Sector Directive of 2014 contains the word "competition" 112 times, which thus represents a quite considerable increase by 180 %.

[128] However, no similar provisions can be found in the Concessions Directive 2014/23/EU or the Defence and Security Directive 2009/81/EU.

Indeed, the New Classical Sector Directive of 2014 contains a number of new pro-competitive provisions as compared to the Former Classical Sector Directive of 2004. The following new provisions are of particular interest when analysing the increased role assigned to competition by the EU legislator in the field of public procurement:

Article 46 (1) – Division of contracts into lots[129]
"Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

Contracting authorities shall, except in respect of contracts whose division has been made mandatory pursuant to paragraph 4 of this Article, **provide an indication of the main reasons for their decision not to subdivide into lots**, which shall be included in the procurement documents or the individual report referred to in Article 84." (emphasis added)

Article 58 (3) – Selection criteria – Limit on the turnover required
"3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such a requirement in the procurement documents or the individual report referred to in Article 84." (emphasis added)

Article 69 (3) – New duty to reject abnormally low tenders in certain cases
"Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2)."

Article 18(2)
"Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X."

[129] The Swedish Competition Authority has recently published a report on how the new duty to provide reasons for not subdividing a procurement into separate lots has been handled by contracting authorities in Sweden, "Rapport 2018:8 – Dela upp eller motivera i upphandlingen" which can be downloaded from the homepage of the Swedish Competition Authority, www.kkv.se.

Article 40 – Preliminary market consultations
"Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency."

Moreover, the following pro-competitive provision, which was already part of the Former Classical Sector Directive of 2004[130] should be mentioned:

Article 42 (2) – Technical specifications shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition
"Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

Moreover, the two first recitals of the New Classical Sector Directive of 2014 should be mentioned:

Recital 1 of the New Classical Sector Directive of 2014
"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. **However, for public contracts above a certain value, provisions should be drawn up** coordinating national procurement procedures **so as to ensure that** those principles are given practical effect and **public procurement is opened up to competition**."

Recital 2 of the New Classical Sector Directive of 2014
"Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, **the public procurement rules a**dopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council (4) and Directive 2004/18/EC of the European Parliament and of the Council (5) **should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement**, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate

[130] Article 23 (2) of the Former Classical Sector Directive of 2004.

certain aspects of related well-established case-law of the Court of Justice of the European Union." (emphasis added)

7.3 Judgments of the European Court of Justice on the Importance of Competition in Public Procurement as well as on the New Competition Principle

7.3.1 The Bridge over the Storebaelt Case of 1993 – CJEU[131]

As to the role of competition in EU public procurement law, the CJEU stated in its judgment in its *The Bridge over the Storebaelt Case* of 1993:

> "Since the Commission claims in its pleadings, which were re-worded in its reply, that Storebaelt acted in breach of the principle that all tenderers should be treated alike, the Danish Government's argument that that principle is not mentioned in the directive and therefore constitutes a new legal basis for the complaint of breach of State obligations must be considered first.
>
> On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, **to ensure in particular the development of effective competition in the field of public contracts** and which, in Title IV, lays down criteria for selection and for award of the contracts, **by means of which such competition is to be ensured**."[132] (emphasis added)

7.3.2 The Michaniki Case of 2008 – CJEU[133]

As to the role of competition in EU public procurement law, the CJEU stated in its *Michaniki AE* judgment of 2008:

> "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"[134] (emphasis added)

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[131] Judgment of the CJEU in Case C-243/89, *Commission* v *Kingdom of Denmark*, of 22 June 1993.

[132] Judgment of the CJEU in Case C-243/89, *Commission* v *Kingdom of Denmark*, of 22 June 1993, para. 33-34.

[133] Judgment of 16 December 2008 in Case C-213/08 *Michaniki* AE.

[134] Judgment of 16 December 2008 in Case C-213/08 *Michaniki* AE, para. 39.

7.3.3 The Azienda Case of 2014 – CJEU[135]

As to the role of competition in EU public procurement law, the CJEU stated in its *Azienda* judgment of 2014:

> "The Court has also pointed out in this regard that one of the objectives of the EU rules on public procurement is to attain the widest possible opening-up to competition (see, to that effect, the judgment in *Bayerischer Rundfunk and Others*, C-337/06, EU:C:2007:786, paragraph 39), an opening-up which is also in the interest of the contracting authority concerned itself, which will thus have greater choice as to the tender which is most advantageous and most suited to the needs of the public authority in question."[136]

7.3.4 The Jema Energy Case of 2017 – General Court of the CJEU[137]

As to the role of competition in EU public procurement law, the General Court stated in its *Jema Energy* judgment of 2017:

> "In addition, the courts of the Union have stated that one of the objectives of the EU rules on public contracts is to open them up to the widest possible competition and that it is in the interest of EU law to ensure the broadest participation possible of bidders in a tendering procedure. It should be added, in this respect, that such an opening to the widest possible competition is contemplated not only in relation to the Union interest in the free movement of goods and services, but also in the self-interest of the contracting authority involved, which will thus have greater choice in terms of the most advantageous offer and the best adapted to the needs of the public entity concerned. …
>
> It follows that an **obligation for the contracting authority not to artificially restrict competition can be deduced from the general principles of law to which the [contracting authority] is subject, and especially from the principle of equal treatment**" [138] (emphasis added, translated from French as the judgment is not available in English).

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[135] Judgment of the CJEU in Case C-568/13, *Azienda Ospedaliero-Universitaria di Careggi-Firenze* v *Data Medical Service Srl*, of 18 December 2014.

[136] Judgment of the CJEU in Case C-568/13, *Azienda Ospedaliero-Universitaria di Careggi-Firenze* v *Data Medical Service Srl*, of 18 December 2014, para. 34.

[137] Judgment of the General Court of the Court of Justice of the European Union in Case T-668/15, *Jema Energy SA*, of 10 November 2017.

[138] Judgment of the General Court of the Court of Justice of the European Union in Case T-668/15, *Jema Energy SA*, of 10 November 2017, para. 102-103. This judgment has been analysed by Albert Sánchez Graells in an article on "Mixed Views on General Court Decision Concerning Claim of Artificial Narrowing of Competition Through too Strict Procurement Selection Requirements" published on his blow How To Crack a Nut on 14 November 2017, https://www.howtocrackanut.com/blog/2017/11/14/general-court-decision-concerning-claim-of-artificial-narrowing-of-competition-through-too-strict-procurement-requirements-t-66815.

7.3.5 The Lloyd's of London Case of 2018 – CJEU[139]

As to the role of competition in EU public procurement law, the CJEU stated in its *Lloyd's of London* judgment of 2018:

> "It should be recalled, in this connection, that the EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and **eliminate restrictions on competition** … In that context, **it is the concern of EU law to ensure the widest possible participation by tenderers in a call for tenders**. …"[140] (emphasis added)

7.3.6 The Roche Lietuva Case of 2018 – CJEU[141]

As to the role of competition in EU public procurement law, the CJEU stated in its *Roche Lietuva* judgment of 2018:

> "Moreover, it appears from that provision that the Union legislation relating to technical specifications allows broad discretion for the contracting authority in the formulation of the technical specifications of a procurement contract.
>
> That margin of appreciation is justified by the fact that the contracting authorities are better placed to know which supplies they need and to determine the requirements necessary to achieve the desired results.
>
> Nonetheless, Directive 2014/24 sets certain limits that the contracting authority must comply with.
>
> In particular, Article 42(2) of Directive 2014/24 requires that the technical specifications afford equal access of economic operators to the procurement procedure and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
>
> That requirement implements the principle of equality of treatment set out in the first subparagraph of Article 18(1) of that directive for the purpose of the formulation of technical specifications. According to this provision, contracting authorities are to treat economic operators equally and without discrimination and are to act in a transparent and proportionate manner.
>
> As the Court has previously held, the principles of equality of treatment, non-discrimination and transparency are of crucial importance so far as concerns technical specifications, in the light of the risks of discrimination related either to the choice of specifications or their formulation (see, as regards Directive 2004/18, judgment of 10 May 2012, Commission v Netherlands, C-368/10, EU:C:2012:284, paragraph 62).
>
> **It is, in addition, stated in the second subparagraph of Article 18(1) of Directive 2014/24 that the design of a procurement is not to be made with the intention of excluding it from the scope of that directive or of artificially narrowing competition, and that competition is to be considered to be artificially**

[139] Judgment of the CJEU in Case C-144/17, *Lloyd's of London* v *Agenzia Regionale per la Protezione dell'Ambiente della Calabria*, of 8 February 2018.

[140] Judgment of the CJEU in Case C-144/17, *Lloyd's of London* v *Agenzia Regionale per la Protezione dell'Ambiente della Calabria*, of 8 February 2018, para. 33-34.

[141] Judgment of the CJEU in Case C-413/17, *Roche Lietuva UAB*, of 25 October 2018.

> **narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.**
>
> **Similarly, recital 74 of Directive 2014/24 specifies that technical specifications should be 'drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator'**. Also according to that recital, 'it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace'.
>
> Complying with those requirements is all the more important when, as in the present case, the technical specifications listed in the procurement documents are formulated in a particularly detailed manner. Indeed, the more detailed the technical specifications, the higher the risk of favouring the products of a given manufacturer will be."[142] (emphasis added)

7.4 Swedish Judgments on the Importance of Competition in Public Procurement as well as on the New Competition Principle under the New LOU of 2017

7.4.1 The Lunnatorp Case of 2017 – Växjö Administrative Court[143]

This case concerned a public procurement proceeding concerning vegetables conducted by the City of Karlskrona. In its judgment of 4 December 2017, the Växjö District Court found that the way the procurement had been designed, in particular as to a mandatory requirement concerning prices for certain products, risked to make it impossible or at least more difficult for potential tenderers to submit competitive bids. The Växjö District Court emphasized the role of competition when it reached the following conclusion applying the New LOU of 2017:

> "Therefore, the mandatory requirement entails a risk of competition being unduly limited and the mandatory requirement cannot be in line with the principle of equal treatment."

7.4.2 The Got Event Case of 2018 – Göteborg Administrative Court of Appeal[144]

On 4 June 2018, the Göteborg Administrative Court of Appeal gave judgment in the *Got Event Case*, dismissing an application to declare a contract ineffec-

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142 Judgment of the CJEU in Case C-413/17, *Roche Lietuva UAB*, of 25 October 2018, para. 29-37.

143 Judgment of the Växjö Administrative Court in Case 2702-17, *Lunnatorp Blekinge AB* v *City of Karlskrona*, of 4 December 2017.

144 Judgment of the Göteborg Administrative Court of Appeal in Case 6481-17, *Got Event AB* v *MSP Event AB*, of 4 June 2018 (Judges Ewa Hagard Linander, Viktoria Sjögren Samuelsson and Roger Petersson).

tive. The reasoning of the Court contains the following statement as to the role of competition in public procurement, which may be the strongest statement made so far by a Swedish administrative court of appeal as to the important role assigned to competition in public procurement legislation under the New LOU of 2017:

> "The overriding purpose of public procurement legislation is to safeguard competition."[145]

7.4.3 The Spinator Case of 2018 – Swedish Supreme Court[146]

On 27 December 2018, the Swedish Supreme Court applied a reasoning similar to the one taken by the Göteborg Administrative Court of Appeal in the Got Event Case presented above, when it gave judgment in *the Spinator Case*, dismissing a claim for damages for breach of public procurement law. The reasoning of the Court contains the following statement as to the role of competition in public procurement, which may be the strongest statement made so far by a Swedish supreme court as to the important role assigned to competition in public procurement legislation:

> "The EU public procurement legislation aims at strengthening the internal market and at preventing distortion of competition, e.g., by protecting those suppliers which submit bids in a public procurement proceeding."

7.4.4 The School Management Case of 2018 – Decision by the Swedish Supreme Administrative Court[147]

The Swedish Legal, Financial and Administrative Services Agency conducted a public procurement proceeding concerning video conference services. When evaluating the different tenders, those suppliers which had supplied the services in question to different Swedish counties obtained more points than those suppliers which had supplied the services in question to contracting authorities based outside Sweden. School Management AB initiated a legal proceeding before the Stockholm Administrative Court and requested that the public procurement proceeding should be redone.

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145 Judgment of the Göteborg Administrative Court of Appeal in Case 6481-17, *Got Event AB* v *MSP Event AB*, of 4 June 2018, p. 3. In the original Swedish version, the sentence reads as follows: "Det grundlägande syftet med den rättsliga regleringen av upphandlingsförfarandet är att värna konkurrensen."

146 Judgment of the Swedish Supreme Court in Case T 1055-18, *Spinator AB* v *Försvarets materielverk*, of 27 December 2018.

147 Judgment of the Stockholm Administrative Court in Case 22470-17, *School Management*, of 15 February 2018.

The Stockholm Administrative Court concluded in its judgment of 15 February 2018 in Case 22470-17 (s. 11) as follows:

> "One of the main purposes of public procurement legislation is to ensure competition and that the EU Internal Market functions. It is true that the award criterion in question favours suppliers which have experience from supplying to contracting authorities in Sweden. However, based on an overall assessment and in view of the fact that contracting authorities enjoy a wide margin of discretion when deciding what is of importance in a public procurement proceeding, the Stockholm Administrative Court considers that the award criterion at hand is not so anti-competitive that it infringes the principle of proportionality."[148]

School Management appealed to the Stockholm Administrative Court of Appeal which decided not to grant leave to appeal.[149] School Management then appealed to the Swedish Supreme Administrative Court and requested that the Swedish Supreme Administrative Court should grant School Management a leave to appeal before the Stockholm Administrative Court of Appeal.

On 30 May 2018, the Swedish Supreme Administrative Court (president Mats Melin and judges Kristina Svahn Starrsjö and Helena Rosén Andersson) decided to grant School Management leave to appeal, stating as follows:

> "The question at hand in this case is whether it infringes the principles that contracting authorities shall treat suppliers equally and without discrimination as well as in a proportionate way, when the award criteria in question relate only to suppliers' experience from earlier supplies to contracting authorities based in Swedish counties. …. … These questions have only rarely been subject to analysis by the jurisprudence. Leave to appeal before the Stockholm Administrative Court of Appeal shall be granted as there is a need for a precedent concerning the questions at hand."[150]

What makes this case so interesting is that that the Stockholm Administrative Court actually found that while the design of the procurement evaluation was restricting competition it was not "so anti-competitive that it infringed the principle of proportionality". In its decision to grant leave to appeal the Swedish Supreme Administrative Court referred the issue of restriction of competition to the principles of equal treatment, non-discrimination and proportionality, without referring to the new principle of competition stipulated by Chapter 4, Article 2 of the New LOU as of 1 January 2017. This may be explained by the fact that the public procurement proceeding in question was initiated before the New LOU entered into force on 1 January 2017. Even so, a precedent on the issue of how to treat restrictions of competition caused by the design of a

[148] Judgment of the Stockholm Administrative Court in Case 22470-17, *School Management*, of 15 February 2018, p. 11.

[149] Decision of the Stockholm Administrative Court of Appeal in Case 2237-18, *School* Management, of 26 March 2018.

[150] Decision to grant leave to appeal of the Swedish Supreme Administrative Court in Case 1909-18, *School Management*, of 30 May 2018, p. 3.

public procurement could have been very important for the overall question on the application of the new competition principle. However, unfortunately from a competition perspective, there will be no precedent judgment in this case as School Management decided to withdraw from the legal proceeding after a leave to appeal before the Stockholm Administrative Court of Appeal had been granted by the Swedish Supreme Administrative Court.

7.4.5 The Carballos Klinic Case of 2018 – Decision by the Swedish Supreme Administrative Court

This case concerning a public procurement proceeding concerning specialized surgery conducted by the County of Stockholm is particularly interesting, as it is, to the author's knowledge, the first time a Swedish court explicitly applied the new competition principle as a separate principle of public procurement law.

In its judgment of 3 July 2018, the Stockholm Administrative Court reasoned as follows:

> "**Carballos has argued that the procurement infringes** the principle of equal treatment and **the competition principle.** The Administrative Court therefore has to assess whether Carballos has managed to prove that the county of Stockholm has infringed any of the principles or any other provision in the New LOU of 2017 and that this has caused or may cause the supplier harm.
>
> Some of the facts of the case are as follows. The procurement documents define supplier as that or the legal persons which submit bids in the procurement. Under the title *Award of contracts* it is indicated that the contracting authority will award one contract for each lot. Lots A, B and C are identical. Only one supplier can be contracted for each lot.
>
> It follows from the Question and Answers document that the contracting authority has answered that companies being member of the same group of companies may submit separate bids. The purpose of dividing the procurement into different lots and stipulating that one supplier can only be awarded one lot is that the County of Stockholm wants to ensure freedom of choice for patients and benchmarking between different undertakings. Moreover, the County of Stockholm submits that having several suppliers having the same mission will provide security in case one of the suppliers would leave the market. It is possible to submit bids through different subsidiaries, but this is not the purpose of the design of the procurement.
>
> The provisions at hand aim at making it easier for small and medium-sized companies to compete. …
>
> The Administrative Court finds that it is not proven that the County of Stockholm by accepting offers from companies belonging to the same group has treated the suppliers in a way which infringes the principle of equal treatment. Moreover**, it has not been proven that the procurement has been designed with the intention**

of limiting competition so that certain suppliers are unduly favoured or disadvantaged."[151] (emphasis added)

Carballos appealed to the Stockholm Administrative Court of Appeal, which rejected Carballos' application for leave to appeal.[152] Carballos then appealed to the Swedish Supreme Administrative Court and requested that the Swedish Supreme Administrative Court should grant leave to appeal and submit a request for a preliminary ruling from the CJEU as to the two following questions concerning the interpretation of the provisions related to the competition principle in the New Public Procurement Directive of 2014:

Question 1 on how to interpret "intention" concerning the new general competition principle

"Shall the notion of "intention" in Article 18 (1) second subparagraph of the New Public Procurement Directive be interpreted in accordance with the subjective intention of the contracting authority or shall the notion of "intention" be interpreted objectively in such a way that intention shall be deemed to be present when it is proven that a provision in a procurement document has the effect to distort competition?"

In its appeal to the Swedish Supreme Administrative Court, Carballos provided the following background information to this first question:

"The new *general* competition principle is applicable as of 1 January 2017 and has the following wording according to Chapter 4 Article 2 of the New LOU:

The design of a procurement shall not be made with the intention of excluding it from the scope of this Act, nor shall it be made with the intention of limiting competition so that certain suppliers are unduly favoured or disadvantaged."

This provision implements the new provision of Article 18 (1) second subparagraph in the New Classical Sector Directive 2014/24/EU:

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

As opposed to the framework related competition principle, the new general competition principle is not restricted to public procurement of framework agreements, but can be applied to all public procurement proceedings. For the new competition principle to be applicable the following two conditions need to be fulfilled: (1) the design of a public procurement is made in such a way that objectively limits competition by unduly favouring or disadvantaging certain suppliers, and (2) that there is an intention to design the public procurement in such a way.

Carballos' main legal ground for its action before the Stockholm Administrative Court and the Stockholm Administrative Court of Appeal is that the county of Stockholm's choice to limit the amount of lots a small supplier with all activities within specialized surgery concentrated to one legal entity can be awarded without limiting the number of lots a large supplier with the same activities spread out in dif-

[151] Judgment of the Stockholm Administrative Court in Case 23148-17, *Carballos Klinic* v *Stockholms läns landsting*, of 3 July 208, p. 8–9. The author of this article acted, together with his colleague Johan Lidén, as counsel to Carballos Klinic AB.

[152] Decision by the Stockholm Administrative Court of Appeal in Case 5670-18, *Carballos Klinic* v *Stockholms läns landsting*, of 3 July 2018.

ferent subsidiaries can be awarded – constitutes an infringement of the competition principle because large suppliers de facto obtains an undue competitive advantage compared to smaller suppliers. It should therefore be common ground that condition (1) is fulfilled as the design of the public procurement is made in such a way that objectively limits competition by unduly favouring or disadvantaging certain suppliers.

Whether condition (2) – intention – is fulfilled depends on whether intention should be interpreted in a subjective or an objective way.

The Parties agree that the county of Stockholm did not have any subjective intention to limit competition. On the contrary, it is common ground that the subjective intention of the county of Stockholm was to design the public procurement in a pro-competitive way. In case condition (2) – intention – should be interpreted based on the contracting authority's subjective intention, the measures undertaken by the county of Stockholm – to limit the amount of lots which can be awarded to each supplier based on the new provisions in Chapter 4, Article 15 of the New LOU – could not infringe the new general competition principle, as there is no subjective intention to limit competition.

If Carballos' understanding of the legal situation is correct, the notion of intention shall be interpreted objectively in such a way that the condition of intention is fulfilled, when it has been proven that a provision of the procurement documents entails a distortion of competition. In that case, the second measure undertaken by the county of Stockholm – to limit the amount of lots which can be awarded to each supplier based on the new provisions in Chapter 4, Article 15 of the New LOU – would infringe the new general competition principle as the condition of anti-competitive intention would be fulfilled from an objective perspective, independently of what subjective intention the county of Stockholm may have had.

It is therefore of paramount importance for the legal assessment in this regard whether the notion of intention in Article 18 (1) second subparagraph in the New Classical Sector Directive 2014/24/EU shall be interpreted on the basis of the subjective intention of the contracting authority or in such an objective way that the condition of anti-competitive intentions can be said to be fulfilled when a certain provision of the procurement documents has been proven to limit competition. Whether the notion of intention should be interpreted in a subjective or objective way cannot be derived from the wording of the New Classical Sector Directive of 2014. Therefore, leave to appeal should be granted in this regard."

Question 2 on whether the framework related competition principle is repealed or confirmed by New Classical Sector Directive of 2014

"Does the provision "Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition" in Recital 61 of the New Classical Sector Directive of 2014 have direct effect, with the result that a procurement has to be recommenced if a certain provision in the procurement documents results in a distortion of competition, independently of whether there is no intention to limit competition?"

In its appeal to the Swedish Supreme Administrative Court, Carballos provided the following background information to this second question:

"As to framework agreements, there has for many years been a considerably more far-reaching *framework agreement related* competition principle in place based on the

> Former Classical Sector Directive of 2004. Its Article 32(2) stipulates that "contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition."
>
> An important difference when applying the framework related competition principle is that it does not matter whether the contracting authority had a subjective intention to limit competition, when applying the framework related competition principle it is sufficient to find that the design of the public procurement in itself entails a distortion of competition.[153]
>
> The design and application of the procurement documents by the county of Stockholm has – as set out above – entailed a distortion of competition favouring larger companies having one or several subsidiaries, which has disadvantaged smaller companies such as Carballos which do not have a group structure where clinical care activities are spread out in one or several subsidiaries. The fact that the subjective intention of the county of Stockholm was to foster competition is not relevant when applying the framework related competition principle in a situation as in the case at hand where an actual distortion of competition has been found.
>
> It is true that the framework related competition principle has not been implemented into the Former LOU of 2008. However, the provisions at hand have had direct effect and were thus legally binding in the same way as if they had been properly implemented into the Former LOU of 2008.
>
> That the directive provision related to the framework related competition principle has direct effect was stated by the Göteborg Administrative Court of Appeal in its judgment of 14 March 2014 in Case 4816-13, …. The Göteborg Administrative Court of Appeal stated on page 3 in its judgment that "improper or anti-competitive use of framework agreements is prohibited" referring to Article 32(2) of the Former Classical Sector Directive of 2004. …
>
> A corresponding provision has been inserted into recital 61 in the New Classical Sector Directive of 2014: "Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition". Therefore, the framework related competition principle still has direct effect. This is supported by the leading professor in European Public Procurement Law, Sue Arrowsmith, who in the most recent edition of her book "The Law of Public and Utilities Procurement" (Volume 1, 3 rd edition, Sweet & Maxwell 2014) on p. 1178 argues that the relevant provision of Recital 61 in the New Classical Sector of 2014 can be regarded as having direct effect in the same way as the corresponding provision in Article 32 (2) of the Former Classical Sector Directive of 2004. …
>
> It is therefore of paramount importance for the legal assessment of whether the second measure undertaken by the county of Stockholm in the procurement at hand – to limit the amount of lots which can be awarded to each supplier based on the new provisions in Chapter 4, Article 15 of the New LOU – infringes the framework related competition principle, to obtain an answer to the [second] question."

On 10 August 2018, the Swedish Supreme Administrative Court rejected Carballos' request to demand a preliminary ruling from the CJEU.[154] Moreover,

[153] This was already stated in the preparatory works for the Former LOU of 2008, see prop. 2006/07:128, p. 172.

[154] Decision by the Swedish Supreme Administrative Court in Case 4206-18, *Carballos Klinic* v *Stockholms läns landsting*, of 3 July 2018.

the Court rejected Carballos' request for a leave to appeal. Hence, unfortunately, the two most important questions concerning the interpretation of the provisions related to the competition principle in the New Public Procurement Directive of 2014 remain unanswered.

7.5 Discussions as to the Existence of a New General Competition Principle in Legal Literature

7.5.1 Sue Arrowsmith's book "The Law of Public and Utilities Procurement, Volume 1"

Sue Arrowsmith writes as follows:

> "Article 18 also contains two other provisions, referred to under the heading of general principles.
>
> First, Art. 18(1) states that "The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."
>
> **This appears to be simply a manifestation of the more general equal treatment principle**, as designing any aspect of the procurement for this reason rather than based on other needs and preferences in the project would clearly infringe that principle".[155] (emphasis added)

7.5.2 Dorthe Kristensen Balshøj's doctoral dissertation on "Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context"

Dorthe Kristensen Balshøj writes as follows:

> "As to the so-called principle of competition, since competition plays a major part in procurement, procurement rules and competition rules ought to develop consistently. When developed consistently – and if the contracting authority is deemed an undertaking – then the tools used in competition law can also be used regarding procurement, and the public buyers can be disciplined properly.
>
> This appears to be a correct interpretation although calling it a principle may be a stretch – among others because when mentioning the principles in the recitals of Directive 2014/24/EU (e.g. Recital 1), there is no mention of competition. What is more, it can be argued that the principles of equal treatment and competition are so closely connected that they make up two sides of the same coin, for which reason there is no need – or room for – a principle of competition.

[155] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, *Volume 1* (Sweet & Maxwell, third edition 2014, p. 631.

Finally, elevating the embedded competition to a principle does not seem to have any consequences at all. As the competition is embedded it must always be considered, but calling it a principle makes no difference.

So to conclude, competition plays a major role in procurement, but in this author's opinion there is no such thing as a competition principle. But even so, it would not change the fact that an assessment of whether the contracting authority carries out economic activity must be made. A principle cannot be used to couple two sets of rules."[156] (emphasis added)

7.5.3 Michael Steinicke's and Peter L. Vesterdorfs commentary on EU Public Procurement Law

In their recent book "EU Public Procurement Law", Michael Steinicke and Peter L. Vesterdorf state the following:

"Article 18 (1), last sentence also provides that the design of the procurement shall not be made with the intention of artificially narrowing competition. This sentence is not very clear and the drafters of the provision have provided a description of what exactly is meant by artificially narrowing the competition stating that competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

At a first reading artificially narrowing competition is basically a question of whether or not there is discrimination: no tenderer must be unduly favoured or disadvantaged. Therefore there is a significant overlap between this part of the provision and the principle of equal treatment. With the significance of the latter principle in mind this principle would probably often be invoked in such situations leaving Article 18 (1), last sentence to play a diminished role.

The most problematic part of Article 18 (1), last sentence, is the reference to "intention". Including the subjective intention of the contracting authority when this entity prepares procurement or when making decisions in the course of the tendering procedure changes the provision and the application dramatically. It is extremely difficult to assess what exactly is the intention of a contracting authority for any given action. That assessment is difficult especially since most decisions could be ascribed to one or more legitimate reasons (e.g. the contracting could award a contract directly to a specific economic operator under the pretences that he thinks this is legitimate according to, inter alia, the rules on negotiated procedures without a prior notice even though this rule is not applicable). It would seem difficult to establish with any amount of certainty that the intention of the contracting authority is to circumvent the procurement rules. There are no indications as to how the interpretation of the intention must be conducted.

It must be assumed that only when the intention of the contracting authority is clear from the context of the decision (of design or within the procedure) the pro-

[156] Dorthe Kristensen Balshøj, Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context, doctoral dissertation presented in 2017 at Aarhus University, p. 67.

vision will be applied. This leaves a very narrow window for application of Article 18 (1), last sentence.

It has been argued that the references in case law and the references in the directives establish a competition principle. It could be argued that since the issue of competition is now part of the provision containing the principles of procurement a competition principle therefore exists. The existence of a competition principle is, however, debated. **There is no question that it would be legitimate to refer to a competition principle, but it is more doubtful if it will be possible to find a well-defined content of such a principle. Based on the case law it could be argued that there is a competition principle, but since the content of this principle is far from clear it is difficult to define exactly what such a principle should involve.** "[157] (emphasis added)

7.5.4 Helena Rosén Andersson, Eva-Maj Mühlenbock, Henrik Willquist and Catharina Piper's commentary on the Swedish Public Procurement Act

In their leading commentary to the Swedish Public Procurement Act, Helena Rosén Andersson, Eva-Maj Mühlenbock, Henrik Willquist and Catharina Piper write as follows:

"**Meaning of the basic principles**

The basic principles for conducting a public procurement proceeding, which are listed in Chapter 1, Article 9 of the Former LOU of 2008, also apply to framework agreements. **Article 32 (2) fifth subparagraph of the Former Classical Sector Directive of 2004 contains a general clause which stipulates that framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition. It is therefore important that the contracting authority takes this general clause into consideration when designing framework agreements. The general clause concerns both the contracting authority's intention as well as the actual effects of the framework agreement.**

The Swedish legislator has chosen not to implement the general clause into the Former LOU of 2008 based on the view of the Swedish Council of Legislation that the content of the directive's general clause already follows from the basic principles. The Swedish Government and the Swedish Parliament shared the view of the Swedish Council of Legislation, see prop. 2006/07:128, part 1, p. 333. The Swedish Competition Authority has a different view which it expressed in a legal opinion (dnr 285/2012) to the Stockholm District Court in Case 1857-12. According to the Swedish Competition Authority, the general clause contains other and more far-reaching requirements than what follows from the basic principles, which have to be followed by a contracting authority when conducting a public procurement concerning framework agreements. The Swedish Competition Authority considers that the general clause has an independent significance. The Authority considers that the EU legislator has introduced the general clause into the directive in order to prevent negative effects on competition which certain framework agreements can have, such as, e.g., large framework agreements which without objective justifica-

[157] Michael Steinicke and Peter L. Vesterdorf (eds), Brussels Commentary on EU Public Procurement Law (C.H. Beck-Hart-Nomos, 2018), p. 329–330.

> tion favour large companies. The Swedish Competition Authority considers that the general clause constitutes a clear, precise and unconditional right which has not been implemented by Chapter 1, Article 9 of the Former LOU of 2008 and which cannot be interpreted in accordance with the wording and purpose of the general clause. **Therefore, the Swedish Competition Authority considers that Swedish Courts may give direct effect to the general clause. A framework agreement which is anti-competitive without infringing the basic principles stipulated in Chapter 1, Article 9 och the Former LOU of 2008 may therefore be subject to intervention by a court giving direct effect to the general clause. It can be argued that the Göteborg Administrative Court of Appeal expressed such a view in its judgment in Case 4816-13 [the *Tigérs* Case].** The Court considered whether suborders may be made for work which is to be performed after the expiration of the framework agreement. The Göteborg Administrative Court of Appeal stated that according to Article 32 (2) fifth subparagraph it is forbidden to use framework agreements in a way which is improper or which distorts competition. As to the facts of the case, the Göteborg Administrative Court found that the supplier had not proven that the contracting authority had used the framework agreement in such an anti-competitive way.
>
> **In this context, it should be noted that Article 18 (1) of the New Classical Directive of 2014 contains, in addition to the five basic principles on, among others, equal treatment and transparency, an explicit prohibition against designing public procurement in such a way that competition is artificially narrowed.** Competition shall be considered artificially narrowed if the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."[158] (emphasis added)

Moreover, as to the competition principle, Helena Rosén Andersson, Eva-Maj Mühlenbock, Henrik Willquist and Catharina Piper write as follows:

> "The Swedish legislator should therefore consider to introduce the general clause [of Article 18(1) of the New Classical Directive of 2014] into the Swedish Public Procurement Act, LOU. Until this happens, there are good reasons to consider that the general clause can be invoked by a supplier against a contracting authority because of the direct effect of the general clause.
>
> As shown above, the general view has been, and is still, that the rules on public procurement aim at combatting obstacles to freedom of movements and sound competition. According to this view, contracting authorities are obliged to avoid taking measures which distort competition but not to take active measures which foster competition, compare Asplund et al., *Överprövning av Upphandling – och andra rättsmedel enligt LOU och LUF* (2012, p. 39 ff.). **However, in legal literature it has been argued that there is another principle in addition to the five principles stipulated by Chapter 1, Article 9 of the Former LOU of 2008 – a competition principle – and that this principle obliges contracting authorities to actively take measures to ensure that the public procurement is pro-competitive, see *Moldén, Public procurement and competition law from a Swedish perspective – some proposals for better interaction,* Europarättslig Tidskift Nr 4 (2012) p. 598 ff.**

[158] Helena Rosén Andersson, Eva-Maj Mühlenbock, Henrik Willquist and Catharina Piper, *Lagen om offentlig upphandling – En kommentar* (Norstedts Gula Bibliotek, second edition 2015), p. 290.

> **See also the judgment of the CJEU in C-213/07, Michaniki, para. 39. A failure to fulfil this obligation would therefore constitute an infringement of the public procurement rules in the same way as an infringement of the principle of transparency or equal treatment.** The Göteborg Administrative Court of Appeal gave in its judgment in Case 4816-13 [the *Tigérs* Case] direct effect to the framework related competition principle embedded in the Former Classical Sector Directive of 2004. This judgment is well in line with what follows from Article 18 in the New Classical Sector Directive of 2014. Also the Stockholm Administrative Court of Appeal in its judgment in Case 6258-10 [The *Familjebostäder* Case of 2011] expressed the view that there is a competition principle by stating that the public procurement rules aim both at making use of competition in the individual public procurement proceeding and at developing effective competition."[159] (emphasis added)

7.5.5 Albert Sanchez Graells' book on Public Procurement and the EU Competition Rules

In the first edition of his book on *Public Procurement and the EU Competition Rules* Albert Sánchez Graells has argued as follows 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."[160]

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[159] Helena Rosén Andersson, Eva-Maj Mühlenbock, Henrik Willquist and Catharina Piper, *Lagen om offentlig upphandling – En kommentar* (Norstedts Gula Bibliotek, second edition 2015), p. 76–77.

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

In the second edition of his book on *Public Procurement and the EU Competition Rules* Albert Sánchez Graells has argued as follows as to the role of competition in public procurement law:

> "In view of this express recognition of the existence of a strong pro-competition rationale and orientation, no doubt should be cast on the existence of a *competition objective* embedded in the EU public procurement directives – which has clearly and consistently been declared as such by the case law of the EU judicature. Indeed, EU case law has repeatedly held that the directives are designed to eliminate practices that restrict competition in general and to open up the procurement market concerned to competition – ie, to ensure free access to public procurement, in particular for undertakings from other Member States. The reasons behind this pro-competitive approach to public procurement are that effective competition is expected firstly to remove barriers that prevent new players from entering the market, secondly to benefit contracting entities which will be able to choose from among more tenderers and, thus, will be more likely to obtain value for money, and, finally, to help maintain the integrity of procurement procedures as such. Consequently, it is submitted that EU public procurement rules and their interpreting case law has established with pristine clarity that this body of regulation has the promotion of effective competition as one of its fundamental goals.
>
> In my opinion, the pursuit of this primary objective has generated or resulted in the emergence of a *competition principle* that underlies and guides (or in my opinion, should guide) the rules and regulatory options adopted by the EU public procurement system in trying to achieve this objective of effective competition in public procurement markets. … Such a principle has now been consolidated in Article 18 (1) of Directive 2014/24, which in my view constitutes a mere incremental step in the development of the EU system of procurement rules …. To be sure, the distinction between the competition *goal* persistently and emphatically stressed by the EU directives and their interpreting case law, and the ensuing competition *principle* hereby identified might to some seen blurry, since they largely imply each other or, in other terms, *hold a biunivocal or interconnected relation*. The close link between the objective and the principle is acknowledged and, for the analytical purposes of this study, the principle of competition will be understood and referred to as the 'translation' or 'materialisation' of the competition goal clearly and undoubtedly pursued by the EU directives."[161]

Moreover, in a recently published book on *Discretion in EU Public Procurement*, Albert Sánchez Graells has argued as follows as to the role of competition in public procurement law:

> "[I]t is worth stressing that Article 18(1) of Directive 2014/24/EU has now consolidated the principle of competition by establishing that '[t]he design of the procurement shall not be made with the intention of … artificially narrowing down competition. Competition shall be considered to be artificially narrowed down where the design is made with the intention of unduly favouring or disadvantaging certain economic operators.' This has placed the principled of competition on a par

[161] Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (Hart Publishing, second edition, 2015), p. 198–199.

with those of equality, non-discrimination, proportionality and transparency, and stressed its role as a *general principle* of EU public procurement law. This strengthens the constraint that the competition principle imposes on the exercise of executive discretion by contracting authorities, and even if the drafting of Article 18 (1) of Directive 2014/24/EU raises difficult interpretive questions, I would expect the general principle of competition to gain further prominence in procurement litigation based on the 2014 rules and domestic transposition in the Member States."[162]

7.5.6 SIGMA Brief 1 – Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions, published by the OECD in September 2016

In September 2016, the OECD published a very interesting report on *Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions*, which highlights the role of competition in EU public procurement law as follows:

"**General context**
To understand the basics of public procurement in the European Union (EU), it is necessary to look at the procurement Directives themselves as well as the context in which they were adopted. Even with the Directives in place, more general provisions contained in the Treaty of Rome and more general principles of law will apply and will guide the interpretation of the Directives. It is also important to understand the role of the various EU institutions.

Treaty on the Functioning of the European Union (TFEU)
The TFEU does not include any explicit provisions relating to public procurement. It does establish, however, a number of fundamental principles (Treaty principles) that underpin the EU. Of these fundamental principles, the most relevant in terms of public procurement are the following:
– prohibition against discrimination on grounds of nationality;
– free movement of goods;
– freedom to provide services;
– freedom of establishment.

General Principles of Law: In addition to these fundamental Treaty principles, some general principles of law have emerged from the case law of the Court of Justice of the European Union (CJEU). These general principles of law are important because they will often be used by the CJEU to fill in gaps in the legislation and to provide

[162] Albert Sánchez Graells, "Some Reflections on the 'Artificial Narrowing of Competition' as a Check on Executive Discretion in Public Procurement" in Sanja Bogojevic, Xavier Groussot and Jörgen Hettne (eds), *Discretion in EU Public Procurement Law* (Hart Publishing, 2019), p. 81. See also Albert Sánchez Graells, "A Deformed Principle of Competition? The Subjective Drafting of Article 18 (1) of Directive 2014/24" in Grith Skovgaard Ølykke and Albert Sánchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing 2016) 80, and Albert Sánchez Graells, "Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows" (2016) 18 *Cambridge Yearbook of European Legal Studies* 93.

solutions to situations that are often very complex. The most important of these general principles of law in the procurement context are the following:

- equality of treatment;
- transparency;
- mutual recognition;
- proportionality.

These general principles apply independently of the Directives so that, even if the Directives do not apply, the principles may still apply to the procurement and award of contracts by contracting entities."[163]

"**Basic principles of public procurement**

From its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU Member States. Creating a common procurement market means removing any barriers to trade arising from the procurement context.

Barriers to trade can be erected by means of legislation or by the actions of contracting authorities or economic operators. Legislation can create barriers by imposing requirements to "buy national". Contracting authorities can impose barriers by making discriminatory award decisions. Economic operators can also create barriers by colluding to arrange tender prices dishonestly. All of these barriers have the effect of distorting competition in the common procurement market. One of the primary purposes of public procurement legislation is to eliminate existing barriers and prevent the erection of new barriers. It does so by applying the basic principles flowing through the legislation.

While they are all interlinked, these principles can be reduced to a series of core principles:

– **Competition**

From an economic perspective, "competition" operates as a discovery procedure by allowing different economic operators to communicate the prices at which goods and services are available on the market. Those prices act as guideposts and reflect the demand and supply conditions at any given moment. They also reflect the differences in quality and in terms and conditions of sale of the different (non-homogeneous) products available.

This is why advertising is so important. Advertising guarantees the widest possible publicity and competition, enabling economic operators from all over the EU to participate, thus ensuring the greatest possible choice.

Keeping competition fair (or maintaining a "level playing field") is a key concern for achieving efficient and economic procurement results. Procurement legislation seeks to prevent any distortions or restrictions of competition within the EU, and any attempt to prevent economic operators from being able to tender is to be prohibited.

Such attempts can take many forms and can affect the products or services or the economic operator itself. As a result, the legislation prohibits barriers to the free movement of goods, such as import restrictions and "buy national" policies, and

[163] SIGMA Brief 1 – Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions, published by the OECD in September 2016, p. 2, available under http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-1-200117.pdf

barriers to the freedom to provide services, such as attempts to restrict foreign economic operators from tendering through the use of local registration requirements.

Protecting competition is also a question of maintaining equality of treatment, avoiding discrimination, applying mutual recognition principles (of equivalent products and qualifications), and ensuring that any exceptions are proportional."[164]

"**Value for money**
A key economic driver underlying procurement processes is the need to ensure that all purchasing represents value for money. The Directives do not specifically address this issue, but it is important to not lose sight of the need to ensure that value for money will be one of the main outcomes of the procurement process. The term value for money means the optimum combination between the various cost-related and non-cost-related factors that together meet the contracting authority's requirements. The elements constituting the optimum combination of these various factors differ from procurement to procurement and depend on the outputs required by the contracting authority for the procurement exercise concerned.

The Directive and the Utilities Directive require all contracts to be awarded by applying the "most economically advantageous tender" criterion. These Directives place significant emphasis on contracts being awarded on the basis of a combination of cost-related and noncost-related factors."[165] (emphasis added)

7.5.7 Conclusions on why there actually is a New General Principle of Competition

From a practical perspective, it may not be that important whether the pro-competitive provision of Chapter 4, Article 2 of the New LOU of 2017 implementing Article 18 (1) of the New Classical Sector Directive of 2014 can be legally characterized as a general principle or not. The reason for this can be found in Chapter 20, Section 6 of the New LOU of 2017, which stipulates that:

"If the contracting authority is in **breach of any of the basic principles in Chapter 4, Section 1 or any other provision in this Act** and this has caused or may cause the supplier harm, the court shall decide that the procurement shall be recommenced or that it may be concluded only once corrections have been made." (emphasis added)

This provision is well in line with Article 1 of the Remedies Directive, which stipulates:

[164] SIGMA Brief 1 – Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions, published by the OECD in September 2016, p. 4–5, available under http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-1-200117.pdf

[165] SIGMA Brief 1 – Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions, published by the OECD in September 2016, p. 6, available under http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-1-200117.pdf

> "Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, **decisions taken by the contracting authorities may be reviewed** effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, **on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.**"[166] (emphasis added)

According to Chapter 20, Article 6 of the New LOU an infringement of the pro-competitive provision at hand will thus lead to a judgment ordering the procurement to be recommenced, irrespectively of whether it is labelled as a basic principle or not, as it in any way constitutes "any other provision in this Act".

As to the academically very interesting question whether the new pro-competitive provision at hand constitutes a general competition principle, it should first be pointed out that it either could constitute a general principle of EU law – or just a general principle of public procurement law enacted by the New Classical Sector Directive of 2014.

When analyzing this it is important, as set out by Albert Sánchez Graells above to distinguish between a competition principle in the sense of the general overriding purpose of public procurement to foster effective competition on the one hand and a competition principle as an operational competition principle entailing a judgment ordering the procurement to be recommenced if it is breached on the other hand.

Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell have summarized the competition principle in the first sense – ie. as the overriding 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 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."[167] (author's translation)

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[166] Article 1 of the Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC), as amended by Directive 2007/66/EU and the 2014 Directives.

[167] 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.

It is indeed, as pointed out by Albert Sánchez Graells above, obvious from the case law of the CJEU that there is a competition principle in the first sense, i.e. as the overriding purpose of public procurement law to foster effective competition. But having concluded that, it does not follow automatically that there is also a competition principle in the sense of an operational competition principle entailing a judgment ordering the procurement to be recommenced if it is breached against.

The judgment of the General Court in the *Jema Energy Case of 2017* presented in section 7.3.4 above, according to which an obligation for the contracting authority not to artificially restrict competition can be deduced from the general principles of law and especially from the principle of equal treatment, constitutes a strong argument for the view supported by Albert Sánchez Graells that there is an embedded competition principle in EU public procurement law. However, as the obligation for contracting authorities not to artificially restrict competition has now been consolidated into Article 18 (1) under the title "Principles of procurement", the question whether the competition principle can be directly deduced from general principles of EU law has lost its practical relevance, as it is now follows clearly form the wording of Article 18 (1) of the New Classical Sector Directive. Moreover, in view of the pro-competitive provision being placed under the title "Principles of procurement", it would constitute an unwarranted *contra legem* interpretation to deny the new pro-competitive provision its status as a general principal of public procurement law. Even if the established five principles of public procurement are derived from the corresponding general principles of EU law[168] such as the principle of equal treatment and the principle of proportionality, it is fully in line with EU law for the procurement directives to establish general principles of public procurement law, which do not necessarily apply outside the scope of public procurement.

However, as set out in section 7.4.5 above concerning the *Carballos Klinic Case of 2018*, the new general competition principle stipulated by Article 18 (1) is currently very difficult to apply in practice. The reason for this is the condition of anti-competitive intent, which if it is to be interpreted in a subjective way, would be very difficult to prove for any supplier requesting a judicial review of a public procurement proceeding. The notion of anti-competitive intent therefore needs to be clarified, preferably by way of a preliminary ruling from the CJEU, before it could be regularly applied.

However, as correctly pointed out by the Swedish Competition Authority in its legal opinion in the *The SKL Kommentus Printer and Copying Machines Case of 2012* presented in section 6.5.4 above, competition concerns are much more

[168] For a general discussion of the concept of general principles of EU law, see TC Hartley, The Foundations of European Union Law (Oxford University Press, eighth edition, 2014), p. 144 ff.

likely to occur when contracting authorities procure by way of (often very large) framework agreements as opposed to procuring by way of individual contracts, which are generally economically less important and thus represent lower risk as to creating a distortion of competition. Therefore, it can be argued that there are good reasons for applying a considerably more limited general competition principle to contracts in general. Such contracts are much less likely to create distortions of competition and therefore it does make sense to apply the principle of competition only in those exceptional cases where the supplier actually can prove that the contracting authority had an anti-competitive intent.

However, as to framework agreements it does make sense that no anti-competitive intent is required and that, under Recital 61 of the New Classical Sector Directive it is sufficient for the supplier to prove anti-competitive effects. Therefore, for the vast majority of cases where the competition principle actually may be applicable – i.e. in cases of large framework agreement – it is not the new general competition principle but the framework agreement related competition principle established by the Former Classical Sector Directive of 2004 and reaffirmed by Recital 61 of the New Classical Sector Directive of 2014 which would be invoked by those suppliers which are aware of the provisions, which can be said to be rather unfortunately hidden in Recital 61.

Against this background, it is very unfortunate that the framework related competition principle, which is very relevant from a practical perspective is not mentioned at all in the New LOU of 2017 as opposed to the new general competition principle, which from a practical perspective is much less relevant. It is therefore proposed that the Swedish legislator should insert a new Article into Chapter 7 on framework agreements in the New LOU of 2017. A new provision, implementing Recital 61 of the New Classical Sector Directive should be inserted as the new Article 2 of the chapter having the following wording: "Framework agreements may not be used in such a way as to prevent, restrict or distort competition."

7.6 Proposal that the Swedish Competition Authority as well as the Swedish National Agency for Public Procurement should follow the example of the EU Commission and the Swedish Government to publish information on the competition principle on their homepages

7.6.1 Information on the competition principle on the website of the Commission's DG Grow

If you search for "public procurement" on the website of the Commission's Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG Grow) you will find the following information:

"*What the European Commission does*
Legal rules, implementation and enforcement
EU directives on public procurement cover tenders that are expected to be worth more than a given amount. **The core principles of these directives are** transparency, equal treatment, **open competition**, and sound procedural management. **They are designed to achieve a procurement market that is competitive**, open, and well-regulated. This is essential for putting public funds to good use."[169] (emphasis added)

7.6.2 The Danish example: Optimum use of public funds via effective competition as the overriding purpose of public procurement law

If you search for "public procurement" on the website of the Danish Competition and Consumer Authority you will be directed to the Danish Public Procurement Act, whose first part starts as follows

"*Part 1 Purpose and general principles, etc.*
Purpose
Section 1. **The purpose of this Act shall be** to establish the practices for public procurement and thus enable optimum use of public funds via **effective competition**.

General principles
Section 2. In public procurement procedures, a contracting authority shall observe the principles of equal treatment, transparency and proportionality pursuant to Title II-IV.

(2) **A public procurement procedure may not be designed for the purpose of exclusion from the scope of the present Act or limit competition in an artificial manner**."[170] (emphasis added)

7.6.3 Information on the competition principle on the website of the Swedish Government

If you search for "public procurement" on the website of the Swedish Government you will be directed to the following information on how public procurement works in Sweden:

"*Public procurement – How it works in Sweden*
Public procurement must be efficient and legally certain, and **make use of market competition**. It must also promote innovative solutions and take environmental and social considerations into account. The procurement law framework must also help realise the internal market and facilitate the free movement of goods and ser-

[169] https://ec.europa.eu/growth/single-market/public-procurement_en, accessed on 14 October 2019.

[170] https://www.en.kfst.dk/public-procurement/the-public-procurement-act/. The principle of effective competition as a purpose of public procurement law is analysed in Steen Treumer (ed), *Udbudsretten* (Ex Tuto, 2019), p. 50 ff.

vices in the European Union. **Opening purchases made by public authorities** and public bodies **to competition can mean better deals for the public sector and a more efficient use of public funds.**"[171] (emphasis added)

7.6.4 Current lack of information concerning the competition principle on the websites of the Swedish Competition Authority as well as the Swedish National Agency for Public Procurement

If you search for "public procurement" on the website of the Swedish National Agency for Public Procurement you will be directed to the following information:

"*About the public procurement rules*
The aim of the procurement rules is to ensure that contracting authorities use public funds to finance public purchases in the best possible way by seeking out and **taking advantage of competition** in the relevant market in order to get a good deal."[172]

Thereafter, the following five fundamental principles for public procurement are mentioned: the principle of non-discrimination, the principle of equal treatment, the principle of transparency, the principle of proportionality and the principle of mutual recognition.

It can therefore be noted that the competition principle is currently not mentioned among the principles of public procurement on the website of the Swedish National Agency for Public Procurement.

If you search for "public procurement" on the website of the Swedish Competition Authority, you will find the following text on the purpose of public procurement legislation:

"Each year, the public sector makes purchases for an estimated SEK 683 billion. To ensure that tax monies are used in the best way possible, and **to safeguard competition on the market, authorities must observe certain rules when performing procurements**."[173] (emphasis added)

I you then click on "Basic principles for public procurement" you will find the following information:

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[171] https://www.government.se/government-policy/central-government-adminstration/public-procurement---how-it-works-in-sweden/, downloaded from the homepage of the Swedish Government on 11 October 2019.

[172] https://www.upphandlingsmyndigheten.se/en/publicprocurement/about-the-public-procurement-rules/, accessed on 14 October 2019. According to the information on the website the most recent update of this text was made on 2 January 2017, the first working day after the New LOU of 2017 entered into force.

[173] http://www.konkurrensverket.se/en/publicprocurement/about-the-legislation/, accessed on 14 October 2019.

> "All legislation governing public procurement rests on five basic principles. The provisions in the procurement acts should always be interpreted with these taken into account."[174]

Thereafter, the following five fundamental principles for public procurement are mentioned: Non-discrimination, Equal treatment, Proportionality, Transparency and Mutual recognition.

It can therefore be noted that the competition principle is currently not mentioned among the principles of public procurement on the website of the Swedish Competition Authority.

However, it is interesting no note that when the author accessed the same website on 1 January 2017, on the very day the New LOU of 2017 entered into force, the list of basic principles for public procurement did include the new competition principle. The text of the website in this regard was on 1 January 2017:

> "**Competition**
> **The competition principle means that the design of a procurement shall not be made with the intention of limiting competition** so that certain suppliers are unduly favoured or disadvantaged." (author's translation, emphasis added)"[175]

As concluded above, Chapter 4, Article 2 of the New LOU of 2017 together with Article 18 (1) of the New Classical Sector Directive of 2014 established a new general competition principle in public procurement law. Therefore, the Swedish Competition Authority as well as the Swedish National Agency for Public Procurement should consider to include information on the new general competition principle on their websites when informing on the principles of public procurement law.

7.7 Proposal to enable the Swedish Competition Authority to take legal action against anti-competitive design of public procurement proceedings – as it used to have until 2008

Back in 1997, The Swedish Supreme Administrative Court gave judgment in a case which clearly shows the importance attributed to competition in Swedish public procurement law twenty years ago. The County Work Council of Älvsborg had conducted a public procurement proceeding concerning certain edu-

[174] http://www.konkurrensverket.se/en/publicprocurement/about-the-legislation/basic-principles-for-public-procurement/, accessed on 14 October 2019. According to the information on the website the most recent update of this text was made on 24 October 2018.

[175] The original Swedish version reads as follows: "Konkurrens: Konkurrensprincipen innebär att en upphandling inte får utformas i syfte att begränsa konkurrensen så att vissa leverantörer gynnas eller missgynnas på ett otillbörligt sätt".

cational services. The public procurement documents contained a mandatory requirement for all tenderers to disclose their own costs as to teachers, premises, administration etc. The Swedish Supreme Administrative Court stated as follows:

> "As to the requirement of specifying the costs in question, the Swedish Council for Public Procurement as well as the Swedish Competition Authority have stated that the requirement is anti-competitive. The Swedish Supreme Administrative Court shares this view and therefore finds that it is contrary to Chapter 1, Article 4 of the [former] Swedish Public Procurement Act of 1993 to request the cost specification in question."

For this reason the Swedish Supreme Administrative Court decided that the public procurement proceeding had to be recommenced. The judgment was based on the provisions of Chapter 1, Article 4, first paragraph, of the former Swedish Public Procurement Act of 1993[176], which 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." The Swedish Public Procurement Act of 1993 thus contained a very clear obligation on contracting authorities to make use of the existing possibilities for competition.

Moreover, it is interesting to note that at that time the Swedish Competition Authority had a clear and explicit legal competence under public procurement law to intervene against contracting authorities which acted in an anti-competitive way when procuring. 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. This legal competence followed from Article 3 of the Act on Intervention against Improper Behaviour Related to Public Procurement[177] enacted in 1994, which reads as follows in this regard:

> "**Intervention against improper behavior**
> The Swedish Market Court, may upon application [by the Swedish Competition Authority] prohibit a contracting authority conducting a public procurement proceeding to act in a way which, in an overall assessment, shall be regarded as improper, because (1) a contracting authority significantly discriminates against a supplier, either in relation to the activities carried out by the contracting authority itself or in relation to another supplier, or (2) the behavior in any other way significantly distorts the conditions for competition related to the procurement proceeding." (author's translation, emphasis added)

[176] Lag (1992:1528) om offentlig upphandling.

[177] Lag (1994:615) om ingripande mot otillbörligt beteende vid upphandling (LIU). The author of this Article worked from 2006 to 2011 at the Competition Department 3 of the Swedish Competition Authority, which was responsible for enforcing this law until it was abolished in 2008.

When the former LOU of 1993 was replaced by the Former LOU of 2008, the explicit obligation to make use of the existing possibilities of competition when following the principle of acting in a businesslike way disappeared from the public procurement act, making place for the five established EU general principles of public procurement. Moreover, in the same year of 2008, the Act on Intervention against Improper Behaviour Related to Public Procurement of 1994 was repealed, after having been quite rarely applied during its last years of existence.

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**."[178] (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 not only passive market spectators but active market participants whose actions may significantly affect market conditions and competition. The competition principle 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.

One of the most interesting judgments in this regard is the *The Familjebostäder Case of 2011*. The Stockholm Administrative Court of Appeal has in February 2011, while applying the Former LOU of 2008, stated the following as to the role of competition in 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**

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

> **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."[179] (author's translation and emphasis)

If the main aim of the Swedish Public Procurement Act, LOU, is indeed to foster competition, it has the same main purpose as the Swedish Competition Act. Competition law is mainly enforced by way of public enforcement, i.e., by the Swedish Competition Authority, the European Commission and other national competition authorities, and only to a minor part by way of private enforcement by individual companies. In contrast, the system of remedies under EU public procurement law is to a very large degree based on supplier review, where the supplier has the right to seek review of award decisions through a competent review body[180], i.e. a system of private enforcement. Public enforcement is focused on cases of illegal direct awards, where the Swedish Competition Authority has an explicit right respectively duty to intervene (Chapter 21 of the New LOU of 2017).

In view of the renewed focus on competition in the new LOU of 2017, the question arises which competence, if any, the Swedish Competition Authority currently has to intervene against artificial narrowing of competition in general, respectively against anti-competitive framework agreements. In this regard it is important to note the judgment of the Swedish Supreme Administrative Court of 10 December 2018 in Case HFD 2018 ref. 71. The Swedish Competition Authority had conducted an investigation against a number of municipalities purchasing waste disposal services from a company they owned together. The Swedish Competition Authority adopted a decision stating that the purchases infringed Swedish public procurement law as the Teckal-criteria for in-house purchases were not fulfilled.

The Swedish Supreme Administrative Court found that the Swedish Competition Authority was not entitled to take a decision declaring that a certain behavior infringes public procurement law, referring to a statement in the preparatory works that the Swedish Competition Authority should not be given such a competence (prop. 2009/10:180 p. 218). Therefore, the Supreme Administrative Court annulled the decision of the Swedish Competition Authority.

The effect of this precedent is that is now clear that the Swedish Competition Authority currently has no formal competence to prohibit any anti-competi-

[179] 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.

[180] See Michael Steinicke and Peter L. Vesterdorf (eds), Brussels Commentary on EU Public Procurement Law (C.H. Beck-Hart-Nomos, 2018), p. 1395.

tive behavior by a contracting authority under public procurement law. It is therefore proposed that the Swedish legislator should consider to re-enact a formal competence to the Swedish Competition Authority to intervene against infringements of the new general competition principle and the framework related competition principle, in a way similar to the formal competence the Swedish Competition Authority had until 2008 under the Act on Intervention against Improper Behaviour Related to Public Procurement of 1994. This proposal is well in line with the proposals made by the Swedish Competition Authority in a recent memorandum of 1 July 2019, according to which the Authority should be granted a general legal competence to prohibit any behaviour by a contracting authority which infringes public procurement law.

7.8 Proposal that Swedish administrative courts should move from a pro-formalistic approach to a more pro-competitive and effects-based approach when assessing whether a certain public procurement proceeding is in line with the framework related competition principle as well as the new general competition principle of public procurement law

7.8.1 The Swedish Migration Agency Case of 2002 – Swedish Supreme Court of Administration[181]

In 2001, The Swedish Migration Agency conducted a public procurement proceeding concerning IT-services. The company Sonera Juxto AB successfully challenged the award decision before the Administrative Court of Östergötland, whose judgment was upheld by the Jönköping Administrative Court of Appeal. The Swedish Migration Agency appealed the judgment to the Swedish Supreme Administrative Court. In its landmark judgment of 13 June 2002, the Swedish Supreme Administrative Court agreed with the lower courts that the procurement documents as well as the evaluation method had certain shortcomings and were not designed in an optimal way. However, contrary to the lower courts, the Swedish Supreme Administrative Court found that these shortcomings were not sufficient as to constitute an infringement of public procurement law. The Swedish Supreme Administrative Court's reasoning follows from the following quote:

> "In view of the different circumstances occurring in business life, also public procurement documents and evaluation models which are not optimally designed have

[181] Judgment of the Swedish Supreme Administrative Court in Case RÅ 2002 ref. 50, *The Swedish Migration Agency*, of 13 June 2002 (Judges Ragnemalm, Hulgaard, Schäder, Almgren, Melin).

> to be accepted on the condition that the principles underlying Swedish public procurement legislation and EU-law are not infringed".[182]

The judgment of the Swedish Supreme Administrative Court in the *Swedish Migration Agency Case of 2002* is probably one of the most influential precedents ever on Swedish public procurement law and has since 2002 been successfully raised by many contracting authorities in defense of poorly designed evaluation models. Unfortunately, the effect of the precedent has been that poorly designed evaluation models may have been considered in line with public procurement law irrespectively of their adverse effect on competition as long as they have been in line with formal requirements of the law.

7.8.2 The Frölunda El Case of 2013 – Swedish Supreme Administrative Court[183]

On 15 February 2013, the Swedish Supreme Administrative Court gave judgment in a landmark case on procedural issues in public procurement review procedures, finding that it is permissible to introduce new grounds on appeal before an administrative court of appeal which have not been raised before the administrative court of first instance. What is very interesting for the purpose of this article is the general statement on the scope of a review procedure made by the Swedish Supreme Administrative Court:

> "The judicial review procedure does not take the actual effects of a public procurement proceeding into consideration, it exclusively focuses on the issue of whether the contracting authority has acted correctly from a formal perspective and has adhered to the principles of public procurement and procedural rules indicated in the Swedish public procurement legislation."[184]

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[182] The original Swedish version reads as follows: "De skiftande förhållanden som förekommer i det ekonomiska livet gör att även förfrågningsunderlag och utvärderingsmodeller som inte är optimalt utformade får godtas under förutsättning att de principer som bär upp lagen om offentlig upphandling och gemenskapsrätten inte träds för när."

[183] Judgment of the Swedish Supreme Administrative Court in Case HFD 2013 ref. 5, *Frölunda El & Tele AB* v *Göteborgs Stads Upphandlings Aktiebolag*, of 15 February 2013 (Judges Henrik Jermsten, Nils Dexe, Eskil Nord, Kristina Ståhl and Christer Silfverberg).

[184] Judgment of the Swedish Supreme Administrative Court in Case HFD 2013 ref. 5, *Frölunda El & Tele AB* v *Göteborgs Stads Upphandlings Aktiebolag*, of 15 February 2013, p. 5. The original Swedish version reads as follows: "Överprövningen tar inte sikte på upphandlingens materiella resultat utan endast på om myndigheten förfarit formellt korrekt och iakttagit de upphandlingsprinciper och förfaranderegler som anges i LOU."

7.8.3 The TD-Light Sweden Case of 2016 – Stockholm Administrative Court[185]

On 30 March 2016, the Stockholm Administrative Court gave judgment in the TD-Light Case of 2016, using the precedents of the *The Frölunda El Case of 2013,* according to which the judicial review procedure does not take the actual effects of a public procurement proceeding into consideration, as point of departure. The relevant parts of the Court's reasoning read as follows:

> "The scope of the legal assessment by the Administrative Court
> A judicial review of a public procurement proceeding constitutes, contrary to most other matters subject to review by an administrative court, an assessment of legality which does not contain any assessment of suitability. The judicial review procedure does not take the actual effects of a public procurement proceeding into consideration, it exclusively focuses on the issue of whether the contracting authority has acted correctly from a formal perspective and has adhered to the principles of public procurement and procedural rules indicated in the Swedish public procurement legislation, see the judgment of the Swedish Supreme Court in Case HFD 2013 ref. 5 [*The Frölunda El Case of 2013* presented above]. When a contracting authority decides on details related to the object of a public procurement proceeding, it has a high degree of discretion. 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, see the judgment of the Swedish Supreme Administrative Court in Case RÅ 2010 ref.79 [The *Sutures Case of 2010* presented above]."[186]
>
> "The question whether a framework agreement in a given situation entails a limitation of competition in the meaning of the Former Classical Sector Directive of 2004 does have a certain relevance as to the interpretation of Chapter 1, Article 9 of the Former LOU of 2008. The meaning of the word 'undue' limitation of competition in the EU directive is, however, difficult to determine objectively. The Swedish legislator has discussed this issue in the preparatory works (prop. 2006/07:128 p. 172 f.):
>
> 'Framework agreements for services can be unsuitable when the suppliers have different competences. To procure architectural services including both architects for construction of building and landscape architects in the same contract is not suitable. This can be solved by dividing the procurement into several framework agreements containing similar competence in each framework agreement or by way of direct award if the conditions for this are fulfilled. An important point of departure when starting up a public procurement proceeding is therefore that the contracting authority decides whether it is suitable to use a framework agreement and – if a framework agreement is chosen – that the contracting authority decides how to design the procurement proceeding in a way that competition is not negatively affected.'
>
> In view of Article 32 (2) fifth subparagraph of the Former Classical Sector Directive of 2004, this statement in the preparatory works can be regarded as a tool for interpreting Chapter 1, Article 9 och the New LOU of 2017. From this perspective,

[185] Judgment of the Stockholm Administrative Court in Case 21106-15, *TD-Light Sweden AB* v *SKL Kommentus Inköpscentral AB*, of 30 March 2016.

[186] Judgment of the Stockholm Administrative Court in Case 21106-15, *TD-Light Sweden AB* v *SKL Kommentus Inköpscentral AB*, of 30 March 2016, p. 13.

it can be questioned whether it is suitable to request, as the contracting authority has done in this case, a shopping basket including the entire range of light sources, instead of using a separate shopping basket for environment friendly lamps, from which those municipalities and counties which would like take lead as to a green development could place suborders from. However, the Administrative Court still does not consider that the procedure chosen by the contracting authority is comparable to the example given by Government in the preparatory works that a supplier in a procurement proceeding for architectural services has to be able to offer both architects for the construction of buildings and landscape architects. In the case at hand, there is only one type of products – light fittings. As to differences between light fittings which are of relevance to the case at hand, these are to which fittings they fit, which material they are made of, how long they burn and how they can effect energy consumption and environment, there are no differences as to what the light sources are used for.

However, also the hypothetical architectural services example is described by the Government as unsuitable, not as illegal. As set out above, the Administrative Court has an extremely limited mandate to make an assessment of a public procurement's suitability when assessing whether the Former LOU of 2008 has been infringed. Moreover, the Administrative Court does not consider, when Article 32 (2) fifth subparagraph of the Former Classical Sector Directive of 2004 and the Swedish preparatory works are considered as a tool to interpret Swedish law, that it has been shown that the contracting authority has infringed Chapter 1, Article 9 of the Former LOU of 2008 by setting up a disproportionate requirement. Given these points of departure, the full-range requirement is not discriminatory as it applies to all suppliers."[187]

7.8.4 The OneMed Case of 2019 – Göteborg Administrative Court of Appeal[188]

The far-reaching anti-effects and pro-formalistic approach taken by the Stockholm Administrative Court in the *TD-Light Sweden Case of 2016* mentioned above has recently been reaffirmed by the Göteborg Administrative Court of Appeal in its judgment of 16 April 2019 in the *OneMed Case of 2019*. The relevant reasoning reads as follows:

"The Swedish Supreme Administrative Court has in its judgment in Case RÅ 2002 ref. 50 [*The Swedish Migration Agency Case of 2002* presented above] stated that in view of the different circumstances occurring in business life, also public procurement documents and evaluation models which are not optimally designed have to be accepted on the condition that the principles underlying Swedish public procurement legislation and EU-law are not infringed. Moreover, the Swedish Supreme Administrative Court has stated in its judgment in Case HFD 2013 ref. 5 [*The Frölunda El Case of 2013* presented above] that the judicial review procedure does

[187] Judgment of the Stockholm Administrative Court in Case 21106-15, *TD-Light Sweden AB* v *SKL Kommentus Inköpscentral AB*, of 30 March 2016, p. 20–21.

[188] Judgment of the Göteborg Administrative Court of Appeal in Case 4707-18, *One Med Sverige AB* v *County of Halland*, of 16 April 2019 (judges Petter Classon, Viktoria Sjögren Samuelsson and Roger Petersson).

> not take the actual effects of a public procurement proceeding into consideration, it exclusively focuses on the issue of whether the contracting authority has acted correctly from a formal perspective and has adhered to the principles of public procurement and procedural rules indicated in the Swedish public procurement legislation."[189]

When applying EU public procurement law, Swedish judges may generally apply Swedish procedural rules. However, according to the EU principle of effectiveness, domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law.

As set out in this article, if certain conditions are fulfilled, suppliers have a right to request that an administrative court orders that a public procurement proceeding shall be recommenced in case it artificially narrows competition or, in case of a framework agreement, has the effect of distorting competition.

What then if the judge in question applies the precedents in question, according to which "the judicial review procedure does not take the actual effects of a public procurement proceeding into consideration, it exclusively focuses on the issue of whether the contracting authority has acted correctly from a formal perspective and has adhered to the principles of public procurement and procedural rules indicated the Swedish public procurement legislation"?

There is a rather obvious risk that a judge applying these precedents will make it impossible or excessively difficult for the supplier to enforce the rights derived from EU law as to the framework related competition principle and the new general competition principle under Recital 61, respectively Article 18 (1) of the New Classical Sector Directive of 2014. Therefore, in the author's view, a Swedish judge should disregard the judgments of the Swedish Supreme Administrative Court in *the Swedish Migration Agency Case of 2002* and *the Frölunda El Case of 2013* in this respect as they infringe the EU principle of effectiveness. When assessing whether a given public procurement proceeding infringes the framework related competition principle or the new general competition principle under Recital 61, respectively Article 18 (1) of the New Classical Sector Directive of 2014 it is necessary also to take the actual effects of a public procurement proceeding into consideration, it is in fact contrary to EU law just to exclusively focus on the issue of whether the contracting authority has acted correctly from a formal perspective.

[189] Judgment of the Göteborg Administrative Court of Appeal in Case 4707-18, *One Med Sverige AB* v *County of Halland*, of 16 April 2019, p. 4.

8. OVERALL CONCLUSIONS ON THE NEW COMPETITION PRINCIPLE IN THE NEW EU PUBLIC PROCUREMENT DIRECTIVES – FROM A SWEDISH PERSPECTIVE

The main conclusions of this article are as follows:

- 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. 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 irrespectively 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.
- 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.
- If competition in a public procurement proceeding is hampered by the way the contracting authority has designed it, cooperation between suppliers that would normally constitute an infringement by object cannot be regarded as infringement by object – because the reduction of competition induced by the contracting authority has to be taken into consideration when putting the cooperation in its economic and legal context. It is proposed that the

new principle established by the judgments of the Swedish Patent and Market Court of Appeal in the *Aleris Clinical Physiology Services Case of 2017* and the *Telia/GothNet Data Communication Services Case of 2018* can be called the principle of contracting authority reduced competition excluding infringement by object.

- As the obligation for contracting authorities not to artificially restrict competition has now been consolidated into Article 18 (1) of the New Classical Sector Directive of 2014 under the title "Principles of procurement" the question whether the competition principle can be directly deduced from general principles of EU law has lost its practical relevance, as it now follows clearly form the wording of Article 18 (1). Moreover, in view of the pro-competitive provision being placed under the title "Principles of procurement", it would constitute an unwarranted *contra legem* interpretation to deny the new pro-competitive provision its status as a general principal of public procurement law.
- However, as set out in section 7.4.5 above concerning the *Carballos Klinic Case of 2018*, the new general competition principle stipulated by Article 18 (1) is currently very difficult to apply in practice. The reason for this is the condition of anti-competitive intent, which if it is to be interpreted in a subjective way, would be very difficult to prove for any supplier requesting a judicial review of a public procurement proceeding. The notion of anti-competitive intent therefore needs to be clarified, preferably by way of a preliminary ruling from the CJEU, before it could be regularly applied.
- However, as to framework agreements it clearly does make sense that no anti-competitive intent is required and that, under Recital 61 of the New Classical Sector Directive it is sufficient for the supplier to prove anti-competitive effects. Therefore, for the vast majority of cases where the competition principle actually may be applicable – i.e. in cases of large framework agreement – it is not the new general competition principle but the framework agreement related competition principle established by the Former Classical Sector Directive of 2004 and reaffirmed by Recital 61 of the New Classical Sector Directive of 2014 which would normally be invoked by those suppliers which are aware of the provisions, which can be said to be rather unfortunately hidden in Recital 61.
- Against this background, it is very unfortunate that the framework related competition principle, which is very relevant from a practical perspective is not mentioned at all in the New LOU of 2017 as opposed to the new general competition principle, which from a practical perspective is much less relevant. It is therefore proposed that the Swedish legislator should insert a new Article into Chapter 7 on framework agreements in the New LOU of 2017. A new provision, implementing Recital 61 of the New Classical Sector Directive should be inserted as the new Article 2 of the chapter having the

following wording: "Framework agreements may not be used in such a way as to prevent, restrict or distort competition."

- As concluded above, Chapter 4, Article 2 of the New LOU of 2017 together with Article 18 (1) of the New Classical Sector Directive of 2014 established a new general competition principle in public procurement law. Therefore, the Swedish Competition Authority as well as the Swedish National Agency for Public Procurement should consider to include information on the new general competition principle on their websites when informing on the principles of public procurement law.
- As stated by the Swedish Supreme Administrative Court in its judgment of 10 December 2018 in Case HFD 2018 ref. 71, the Swedish Competition Authority currently has no formal competence to prohibit any anti-competitive behavior by a contracting authority under public procurement law. It is therefore proposed that the Swedish legislator should consider to re-enact a formal competence to the Swedish Competition Authority to intervene against infringements of the new general competition principle and the framework related competition principle, in a way similar to the formal competence the Swedish Competition had until 2008 under the Act on Intervention against Improper Behaviour Related to Public Procurement of 1994.
- When assessing whether a given public procurement proceeding infringes the framework related competition principle or the new general competition principle under Recital 61, respectively Article 18 (1) of the New Classical Sector Directive of 2014 it is necessary also to take the actual effects of a public procurement proceeding into consideration. The judgments of the Swedish Supreme Administrative Court in *the Swedish Migration Agency Case of 2002* and *the Frölunda El Case of 2013*, according to which administrative court should exclusively focus on the issue of whether the contracting authority has acted correctly from a formal perspective, infringes the EU principle of effectiveness and should therefore be disregarded, respectively revoked.

* * *

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On 1 February 1889, the Great Market Hall (Stora Saluhallen) started its operations at the Royal Square in Gothenburg, just a few weeks before the Eiffel tower opened in Paris. At that time, the Great Market Hall of Gothenburg was the largest iron-based building in Sweden. I have chosen this beautiful building for the June 2021 cover photo as a symbol for the subject of this thesis: public procurement and competition.

The black and white photo of the Great Market Hall on this last page of the thesis was taken in 1909. This is an important year for all of us who have studied at the Stockholm School of Economics as the school was founded in 1909, exactly 80 years before I started my undergraduate studies at Handelshögskolan in Stockholm in 1989.

The 1909 photo has been downloaded from the official homepage of the Great Market Hall in Gothenburg (www.storasaluhallen.se).