

# **CURRENT TRENDS IN SLOVAK AND EUROPEAN COMPETITION LAW**

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EUROPARÄTTSLIG TIDSKRIFT ([www.ert.se](http://www.ert.se)) on  
**Public Procurement and Competition Law  
from a Swedish and EU 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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## 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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# Purpose and structure of the article

This article deals with Public Procurement and Competition Law from a Swedish Perspective. It builds on the excellent book on *“Public Procurement and the EU Competition Rules”* published by Albert Sánchez Graells in 2011.

“[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.”

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

## Purpose and structure (2)

**Section 2:** sets out various aspects on how ***competition law is applied on actions by tenderers*** 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.

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

**Section 5:** will address the issue on ***competition law applicable to actions by contracting authorities***.

# The *de lege ferenda* perspective

***This is an article more focused on how the law should be, than where the law currently stands***

- No ambition to cover all aspects of the interaction between public procurement and competition law, but the article still covers a large number of issues
- A selection of particularly interesting Swedish judgements has been made in order to high-light relevant case law and to serve as a background to the various proposals to amend the Swedish Public Procurement Act presented in the articles

# 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 (**LOU**)
- LOU implements Directive 2004/18/EC concerning the coordination of award procedures in the classical sector
- Swedish public procurement in the utilities sector is governed by the Swedish Procurement Act in the Areas of Water, Energy, Transports and Postal Services (**LUF**)
- LUF implements Directive 2004/17/EC coordinating the procurement procedures in the utilities sector

# Introduction to Swedish Public Procurement and Competition Law (2)

- Swedish competition law is governed by the **Swedish Competition Act of 2008** 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, 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.



# Introduction to Swedish Public Procurement and Competition Law (3)

- The Swedish Supreme Court has, in a case concerning the existence of a dominant position, 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)
  - Between 2006-2011 the author served as a Senior Case Officer at the Swedish Competition Authority



# Introduction to Swedish Public Procurement and Competition Law (4)

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; ...”

# Public procurement and competition law applicable to actions by tenderers

- 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. For guidance, you therefore consult the Swedish Public Procurement Act where you find the following two provisions:
- LOU Chapter 1, Article 11 and LOU Chapter 11, article 12

# Public procurement and competition law applicable to actions by tenderers (2)

*“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.” (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.” (emphasis added) <sup>11</sup>

# Public procurement and competition law applicable to actions by tenderers (3)

- 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.

# The Swedish Asphalt Case of 2009 (I)

- Judgment of the Swedish Market Court
- 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 in total.
- The Swedish Market Court stated the following as to bid-rigging:

# The Swedish Asphalt Case of 2009 (II)

From the Judgment:

“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.”

# The Swedish Tyres Case 2010 (I)

- The SCA filed a complaint 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.
- 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 complaint:



# The Swedish Tyres Case 2010 (II)

“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.”**

*(to be developed in-depth in separate presentation)*

## The Swedish Hospital Service Case of 2015

- Judgment of the Stockholm District Court of 18 December 2015
- Fines of approximately 28 MSEK in total
- Aleris, Capió and Hjärtkärlgruppen
- Agreement that – no matter who wins the tender – the parties would share the work to be performed
- Agreement not transparent towards the Contracting Authority

# The Swedish Data Communication Case of 2014

- SCA's plaint before the Stockholm District Court on 17 Dec 2014
- Fines of approximately 35 MSEK requested in total
- Telia Sonera and Göteborg Energi GothNet AB

# The Danish Road Construction Case

- Judgment of the Danish Competition Appeal Tribunal of 12 April 2016
- Tender consortium between Eurostar Danmark A/S and LKF Vejmarkering A/S found contrary to competition law

# The Norwegian Taxi Case

- The Norwegian Competition Authority in July 2011 imposed fines totalling 315 000 Euro on Ski Follo Taxidrift AS, Follo Taxisentral BA and Ski Taxi BA for alleged bid rigging concerning joint participation to a public tender announced in 2010 by the Oslo University Hospital
- Borgarting Court of Appeal in March 2015 confirmed the Authority's decision but reduced fines to 145 000 Euro
- Appeal to the Supreme Court of Norway, which in April 2016 asked an advisory opinion from the EFTA Court (Case E-3/16)

# Joint bidding v. bid rigging cartels – where to draw the line?

- The Pros of Joint bidding (consortia in public tenders)
- The Cons of Joint bidding (consortia in public tenders)
- Where to draw the line between legitimate joint bidding/consortia in public tenders on one side and illegal anti-competitive bid rigging cartels on the other side ?

# Interactive Guidelines of the SCA on joint bidding/consortia in public tenders

- Published in 2013
- Helps companies to self-assess whether a joint bidding project is compatible with Swedish and EU competition law
- Available in Swedish language
- <http://www.konkurrensverket.se/upload/samarbete/story.html>



## Välkommen!

Vi på Konkurrensverket vill göra det så enkelt som möjligt för företag att samarbeta och lämna gemensamma anbud när detta är möjligt. I den här vägledningen får du snabbt svar på vad som normalt är tillåtet.

*Klicka på någon av frågorna för att börja:*

Får vi samarbeta i den här upphandlingen?

Vilken form kan ett samarbete ha?

När får jag använda en konkurrent som underleverantör?

Vilka konsekvenser får ett otillåtet samarbete?

Min fråga står inte här!

Testa dig själv  
Vad kan du om  
samarbete?

# 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 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.
- 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***”.

# Thanks for your attention!

Any questions? Please contact me:

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