SWEDEN

The 'Trends & Developments' sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

Trends and Developments

Contributed by Eversheds Sutherland Advokatbyrå AB

Eversheds Sutherland Advokatbyrå AB is located in central Stockholm and is part of the multinational Eversheds Sutherland law practice, which has 67 offices around the globe to service any and all international requirements of clients, including those who need advice within public procurement. Other primary practice areas related to public procurement include competition law, corporate commercial, litigation and energy sector law, and the team provides substantiated expertise and experience in public procurement law within the classic sector as well as the utilities sectors. It is active on litigation in applications for judicial reviews of public procurements, advising on procurement legislation and assisting in procurement procedures, for Swedish and international clients mainly within the energy, industrial, IT, life sciences and defence sectors.

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With the express purpose of helping contracting authorities, suppliers and others who come into contact with the procurement legislation in questions where the legal certainty is not entirely certain, Konkurrensverket (the Swedish Competition Authority) has recently initiated an approach of issuing a new kind of guideline, wherein the authority gets the opportunity to take more of a stance than previously. This has resulted in a product that the authority is calling "position paper" (in Swedish: " *ställningstagande* ").

Konkurrensverket is the Swedish supervising authority, not only for competition law but also for the procurement legislation. In the latter capacity, it is, among other things, tasked with promoting the uniform application of the national procurement rules.

The rationale for a new kind of guideline is to clarify how Konkurrensverket, in its capacity as the supervising authority, interprets certain difficult questions relating to public procurement where the legislation and case law do not yet provide clear direction. The inspiration and idea to publish a product where Konkurrensverket more distinctly takes a stand than in a normal guideline comes from other Swedish authorities with supervisory responsibilities, such as Kronofogden – the Swedish Enforcement Authority. Konkurrensverket is also, as far as is known, the first supervisory authority among its EU-membership state counterparts to publish a product of this nature.

The aim is not to deliver answers in a specific ongoing case or to explicitly advise a certain contracting authority or supplier, but to express the authority's opinions and views on applicable law on a general level in certain situations where discussions and debate on the interpretation arise regularly, or where Konkurrensverket otherwise notices a tangible need for further guidance.

Thus, the position papers will form an integrated part of the rest of Konkurrensverket's planned supervisory activities, such as deepened procurement investigations, the publish-

ing of reports and decisions, and the submission of applications for procurement fines. Konkurrensverket believes that the position papers will be an effective measure for the benefit of the authority's preventive supervisory work.

Konkurrensverket's intention is to publish three to six position papers each year, and the subjects are to be chosen by first analysing the areas where Konkurrensverket's supervisory activities have the largest impact and will make the most difference. Based on that, legal issues that need to be clarified within such an area are identified and chosen as the subject for a position paper.

The choice of a subject is also influenced by the most frequently recurring questions that are being submitted to Konkurrensverket and to Upphandlingsmyndigheten – the National Agency for Public Procurement, which has the overall responsibility for developing and supporting the procurement processes carried out by the contracting authorities and entities in Sweden.

Konkurrensverket is also welcoming anyone to submit suggestions for uncertain legal issues within the procurement area as the subject of future position papers.

Even though Konkurrensverket is openly stating that any stakeholder who follows the authority's position papers should be able to feel safe if it were to become the subject of an investigation by the authority, there is still the fact that Konkurrensverket is neither a court of law nor a legislator.

When it comes to the actual legal status of Konkurrensverket's position papers, which has been questioned in the public debate following the publication of the first one, it is very likely that they will have quite a substantial practical impact on Swedish procurement procedures, and on the actions of the various stakeholders that come into contact with public procurement. However, it is important to underline that the position papers are not legally binding for any party, and that they will be affected by legislative developments and future case law – on both the national and international level. Konkurrensverket has acknowledged as much by stating that it will monitor the developments in the courts and legislatures and will – if necessary – revise, adjust and update the position papers accordingly.

Essentially, while it is certainly prudent and sensible to adhere to what is – and what will be – stated in a position paper, it is not a course of action that will guarantee legally correct behaviour or make the individual contracting authority, supplier or other stakeholder immune to legal repercussions in the form of judicial review verdicts, procurement fines or damages.

The first position paper (Konkurrensverket's file number 514/2018) was published on 19 December 2018. The opening subject is the procurement of goods and services by State contracting authorities from other State authorities, or, more precisely, whether or not the procurement is applicable to those kinds of agreements.

This is an issue that has been much debated in Sweden, but no case on the subject has been adjudged by the highest tier of the Swedish administrative court system (the Supreme Administrative Court), which means that there is no precedent in case law. Thus, this issue constitutes an ideal candidate for a position paper, since it is fully in line with Konkurrensverket's description of its intent and purpose.

From the existing case law in the lower-tier courts, the issue has been addressed. Principally, it has been the subject of a ruling from the Stockholm Administrative Court of Appeal, one of the four administrative courts of appeal (second-tier courts) in Sweden), in its Case No 7355-16, dated 26 June 2017.

In this case, the Stockholm Administrative Court of Appeal concluded that the fact that two authorities are both part of the same legal entity – the state of Sweden ("the State") – does not automatically mean that an agreement between these two authorities cannot constitute a contract in the meaning intended by the procurement legislation and the underlying EU Directives on Public Procurement. The court stated that an assessment must be made on whether the contract could be considered to be an expression of in-house procurement, or if it should be seen as being entered into by two independent and thereby self-governing parties, which would mean that the public procurement rules were fully applicable. In Case No 7355-16, the Stockholm Administrative Court of Appeal found that the latter situation was at hand.

The background of Case No 7355-16 was that the authority Riksarkivet (the Swedish National Archives) digitalised newspapers for the State agency Kungliga Biblioteket (the National Library of Sweden). Riksarkivet received payment from the National Library and this co-operation had gone on for several years. Both parties are part of the same legal entity – the State – and had in February 2015 signed an agreement for the services.

Depona AB (a company providing document services including digitalisation) challenged the parties through a judicial review claiming the ineffectiveness of the agreement since it constituted an illegal direct award of contract, according to Depona AB.

Kungliga Biblioteket claimed that the services provided by Riksarkivet were not subject to the procurement legislation because the parties were part of the same legal entity and because the exemption for co-operation between contracting authorities (also known as the Hamburg exemption), as established in the European Court of Justice's Case C-480/06

Commission v Germany and nowadays also incorporated in the EU Public Procurement Directives and the national legislation, was applicable. Kungliga Biblioteket also held that the application for judicial review had been submitted too late.

The administrative court (the first-tier administrative court) and the administrative court of appeal shared Depona AB's opinion on the substantive issue in question and stated that, even though the authorities were both part of the same legal entity (the State), they had their own budgets, belonged to different ministries, followed different appropriation directions and had different instructions. This led to the conclusion that the two authorities had to be seen to be factually independent from each other.

The Hamburg exemption was also not applicable, since the agreement merely called for Riksarkivet to perform the digitalisation of newspapers and the only duty for Kungliga Biblioteket was to pay for the services. The services bought by Kungliga Biblioteket did not constitute a co-operation for the purpose of fulfilling a commonly shared goal of public benefit for the parties involved.

Based on this, the courts both found that the Swedish Public Procurement Act was applicable to the agreement. However, the courts did share Kungliga Biblioteket's objection that Depona AB's application had been submitted too late, and it was therefore rejected. The Stockholm Administrative Court of Appeal's ruling was appealed by Depona AB, but the Supreme Administrative Court did not grant a review permit.

After the ruling in Case No 7355-16, Konkurrensverket noticed that a lot of authorities were still uncertain whether the procurement legislation covered situations where State authorities acquire goods or services from – or enters into works contracts with – each other. This led to the issue becoming the subject of the first position paper.

In the position paper, Konkurrensverket states that authority-to-authority activity of this kind, remunerated in money, occurs to a varying degree in Sweden, and that such acquisitions are sometimes of the utmost importance for the function of an authority.

Konkurrensverket goes on to say that there is no Supreme Administrative Court case law providing a precedent for this particular issue. The European Court of Justice (the ECJ) has clarified under which circumstances a contract is under the obligation to be published and publicly procured, according to Directive 2014/24/EU. Konkurrensverket holds that this ECJ case law is of essential importance when assessing whether the authority-to-authority activity is covered by the procurement legislation. Based on this, Konkurrensverket, in its capacity as supervising authority, wants to come forward with its interpretation of the issue.

The account given by Konkurrensverket in the position paper is limited to the issue of whether the Swedish Public Procurement Act is applicable to acquisitions between State authorities. Questions regarding the exemption for in-house procurement and other kinds of co-operation between contracting authorities (ie, the above-mentioned Hamburg exemption) are not covered by the position paper.

Konkurrensverket starts the assessment by clarifying that the Swedish Public Procurement Act is applicable to contracting authorities' acquisition of goods, services and works if the acquisitions are made by entering into such contracts as constitute public contracts in accordance with the ECJ case law (for instance C-264/03 the Commission v France, C-220/05 Jean Auroux, C-382/05 the Commission v Italy and C-220/05 Helmut Müller). Konkurrensverket continues by stating that a public contract presupposes both that it is entered into between a contracting authority and a legal entity or physical person (the supplier) that is independent from that contracting authority, and that the supplier becomes obliged and is being paid to provide the goods or services or to carry out the works by entering into the contract. A contract governed by the procurement legislation creates mutually binding obligations, which in turn shall be possible to enforce through legal actions.

Since a public contract thus presupposes that the supplier is independent from the contracting authority, Konkurrensverket concludes that the way a Member State has organised its State authorities – for example in one or several legal entities – will have an impact on whether or not the procurement legislation is applicable.

Konkurrensverket goes on to say that the internal organisation of the Member States is governed not by EU law, but by the national constitutional legislation of each state. This means that each Member State has the right to determine how its authorities shall be organised and under which legal form the State authorities shall conduct their activities. In this context, Konkurrensverket also refers to existing Swedish case law from the Supreme Administrative Court (Case HFD 2017 ref. 66), where it is stipulated that the Swedish State itself is a legal entity.

Konkurrensverket further states that, in Sweden, the State authorities are all a part of that legal entity – the State. This in turn, according to Konkurrensverket's opinion, means that those State authorities are not independent legal entities in their own right, but that they are in fact *acting as representatives for the State* when conducting their activities. Konkurrensverket adds that the assessment of whether or not the supplier is to be considered independent in relation to the

contracting authority shall also be determined by applying national law and not EU law.

The conclusion reached by Konkurrensverket in the position paper is that the Swedish Public Procurement Act is *not applicable* to situations where a State authority engages another State authority, which is part of the same legal entity, for the performance of, for example, services. This is because acquisitions between such State authorities do not constitute a public contract in the meaning of the Swedish Public Procurement Act.

Konkurrensverket also mentions additional reasons that indicate that the Swedish Public Procurement Act is not applicable. A contract obliged to adhere to the procurement legislation presupposes that it is entered into between a contracting authority on the one hand and a legal entity that is independent from the contracting authority on the other. Konkurrensverket repeats that the State authorities are all a part of the same legal person. When a State authority engages another State authority within the same legal person, the former authority is not making an acquisition from an independent supplier.

Therefore, that kind of redistribution of resources among State authorities cannot result in the authorities entering into a contract in the sense that is intended by the procurement legislation, according to Konkurrensverket. This in turn means that an authority that is a part of the legal person – the State – cannot be considered to be a supplier to another such authority in the sense that is intended by the procurement legislation.

Konkurrensverket recounts that a prerequisite for a public contract falling under the definition in the procurement legislation is that it creates mutually binding legal obligations and that a State authority, due to the lack of ability to stand as a party in its own right, cannot enter into an agreement in any other capacity than as a representative of the State. Konkurrensverket therefore declares that it is not the acting authority but in fact the State that enters into a contract – and the State cannot by way of a contract bind itself to a legal obligation towards itself.

In the same way, two State authorities lack the ability to take on binding legal obligations towards each other by signing a contract. In Konkurrensverket's view, this means that two State authorities cannot enter into a public contract.

At all times, State authorities represent the State within their respective areas of activity and responsibility, and are thus incapable of acting as opposing parties to each other. Konkurrensverket mentions the example that Swedish State authorities are not allowed to bring a case against another State authority to a court of law since it would mean that the State would plead a cause against itself.

An authority belonging to the legal person – the State – can therefore not take legal action against another such authority and achieve fulfilment of obligations in the sense that is required in order for it to be considered a public contract.

The possibility for State authorities to refer disputes with another State authority to the Swedish Government for an assessment does not constitute a legal action. Based on this additional reason, Konkurrensverket finds that one State authority's engagement of another authority that also represents the State will not constitute a contract according to the Swedish Public Procurement Act, which is why the procurement legislation is not applicable to such an agreement, contract or co-operation.

The reactions from the stakeholders to the news of these position papers – and to the authority's conclusion in the first one – seem to have been mostly positive in that it is seen as a welcome initiative from Konkurrensverket to act in this way to show how it assesses an uncertain legal issue.

However, some criticism of Konkurrensverket's conclusion has arisen. The conclusion has been questioned on the basis that it is not quite in line with previous ECJ case law that touches upon the subject of authority-to-authority acquisitions and co-operation. The argument for this is that the ECJ, like the Stockholm Administrative Court of Appeal in Case No 7355-16 (Depona AB v Kungliga Biblioteket), has tended to take a broader practical view of assessing not just the formal but also the actual degree of independence between the authorities involved and the potential and/or tangible impact their agreement or co-operation might have on the relevant market (see, for instance, the ECJ cases C-107/98 Teckal and C-480/06 Commission v Germany), whereas Konkurrensverket in its position paper has adopted a more narrow view of looking primarily at the organisational structure of the Swedish State authorities.

It has also been noted in the debate that Konkurrensverket in the position paper explicitly underlines that, in its interpretation of the law, an acquisition between two State authorities cannot be subject to procurement fines or ineffectiveness of contract in a court of law. A likely real-world repercussion of this statement is therefore that Konkurrensverket will not bring any authority-to-authority cases of this kind to court.

As for the future, there is at the time of writing no set date for the publishing of the next position paper, but Konkurrensverket has pledged that it will arrive sometime during the spring of 2019. Konkurrensverket is working in parallel on a couple of potential – as of yet non-disclosed – topics, which means that the subject of the second position paper has not been revealed either. As mentioned above, Konkurrensverket's ambition is to publish three to six position papers per year. Some position papers will have a similar focus to the first one, where the authority is presenting its interpretation

of a specific pressing issue of legal uncertainty, while some might have a broader approach of providing advice – from the supervisory perspective – for the contracting authorities on practical courses of action during a procurement procedure to help them handle difficult situations and decisions that regularly occur, but where there is a lack of provisions in the law or case law precedents to offer guidance.

As a finishing note on the actual practical impact of Konkurrensverket's position paper on agreements for goods and services between State authorities, it should be mentioned that it has already had at least one visible and publicised effect. One of the larger State authorities, Försäkringskassan (the Swedish Social Insurance Agency), has been tasked by the government to offer and provide safe and co-ordinated IT-operation services for the benefit of other State authorities. A couple of other State authorities have taken this opportunity and have entered into agreements with Försäkringskassan without a prior public procurement procedure. This has been questioned and criticised by the private suppliers of IT-operations on the market, but the authorities have pointed to Konkurrensverket's position paper and one such authority, Myndigheten för digital förvaltning (the Agency for Digital Government), has even gone so far as to call the position paper a *recommendation* for State authorities to avoid initiating a public procurement procedure if there is an alternative in the form of obtaining the goods and services from another State authority.

The bottom line is that, while Konkurrensverket's position papers will surely have a harmonising effect on the stakeholder's action within these uncertain areas of the law in Sweden, they are not actual substitutes but rather placeholders – albeit substantiated as well as appreciated placeholders – for legally binding legislation or case law.

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