

The Strategy of the Swedish Competition Authority and its Direction for Procurement Issues

1 Synopsis

The procurement market is undergoing transformation and is affected by a number of important fundamental driving forces. The Swedish Competition Authority has, as of the 1st of September 2007, taken over those tasks previously resting with the Public Procurement Board (NOU). The government has in its spring proposition and budget proposition set out guidelines for the activities of the Swedish Competition Authority in the field of procurement. In addition, the government has in its instructions and regulations defined the mandate.

The Swedish Competition Authority has, based upon the new and broader mandate, defined the following strategy and direction of the procurement activity.

The vision of the Swedish Competition Authority is "Welfare through well-functioning markets".

This means that the Swedish Competition Authority is striving toward:

- procuring entities being aware of their options regarding procurement and that they avoid violating the Swedish Public Procurements Act,
- the competitive sector of the Swedish economy grows and the competitive solutions are applied to an increased extent in the public sector,
- suppliers have the opportunity and want to take part in procurements,
- Swedish consumers, procuring entities and suppliers know about the significance of competition for a varied selection goods and services of good quality at reasonable prices.

Within the framework of the new broadened mandate, the Swedish Competition Authority will, among other things, focus upon further utilising synergies between the authority's various branches.

In order to attain these goals, the Swedish Competition Authority shall strive for:

- effective legal recourse
- better rules
- a prioritised monitoring with particular focus on
 - identifying procuring entities which act contrary to EC directives and Swedish law
 - identifying illegal award of contracts without prior publication of a contract notice on a systematic scale
 - opening up for small companies in framework contract procurements
- quick, relevant and current information and guidance by paying particular attention to
 - new procurement legislation for 2008
 - competition and spin-offs
 - environmental requirements
 - Public-private partnership (PPP)
 - new procurement forms
- small and medium-sized companies' participation in procurements
- increased collaboration between state authorities with particular mandates in the field of procurement
- increased research and improved statistics

The strategy and direction indicated in this document is not a finished product, rather an initial step toward developing the operation with procurement issues. The strategy shall be seen in a longer perspective. The Swedish Competition Authority will follow up on this strategy and develop it in light of the experiences and points of view the authority receives. In order to design the operation in the best manner, a dialogue with the interested parties within the public sector will be

necessary. The advisory board for procurement issues established by the Swedish Competition Authority is an important platform

The Swedish Competition Authority will in cooperation with local public authorities arrange local conferences in order to hold in-depth discussions regarding the strategy and direction of the authority's operations. These discussions will also be utilised to present information about the new legislation which comes into effect in 2008.

2 Bases for Operation

2.1 The Mandate

According to the letter of regulation¹, the Swedish Competition Authority shall report on how the authority intends to work with matters pertaining to public procurements. Of particular interest are the direction and strategy of the authority in these matters. A report shall also be submitted for those measures the authority intends to take in order to improve the opportunities for small and medium-sized companies to take part in public procurements.

2.2 Public Procurement a Strategic Market for Growth and Welfare

A well-functioning competitive environment normally leads to improvements for the citizens and their welfare. When companies compete on the product market for the favour of the consumers, production efficiency is promoted through a more rational production and a better distribution of the community's resources. Furthermore, open and well-functioning markets lead to dynamic efficiency benefits in the form of innovation and so-called dynamic selection, which means that less efficient companies are out-competed over time by more efficient and vibrant companies.

The public sector represents a large part of the Swedish economy. The Swedish Parliament has indicated that the competitive sector of the Swedish economy shall grow². On this basis, the opportunities to create competition within the public sector are of great importance.

Public purchases are estimated to represent approximately one third of public sector expenses. It is therefore of great importance for the citizens that the procurement is handled efficiently and competitively neutral. Consequently, the procurement markets are strategic for the economic growth and welfare in Sweden.

The central regulation is the Swedish Public Procurement Act (LOU) which regulates the purchasing of goods and services for public entities. The law based on the EC directive strives among other things to treat all competing suppliers the same and to use tax funds in the best manner.

¹ See changes to the regulations for the budget year 2007 (2007-06-28,N2007/5651/MK).

² Proposition 1999/2000: 140.

2.3 Applicable Regulations

The EC procurement directive is an important part of the regulations striving for well-functioning markets. The Swedish Public Procurement Act (LOU, SFS 1992:1528) came about as a result of Sweden becoming a member of the EEC and later the EU. The law came into effect on the 1st of January 1994. The fundamental principles follow from the EC treaty, but the treaty does not contain any specific regulation for the execution of public procurements. Procedural rules regarding procurements can be found in the EC procurement directive which is a vital cornerstone in the ambition toward the free market and the movement of goods and services, among other things. The Swedish rules in the Swedish Public Procurement Act are to a large degree based on these EC directives.

The government has in prop. 2006/ 07:128 submitted proposals for a new law regarding the award of public works contracts, public supply contracts and public service contracts as well a new law regarding procurements in the fields of water, energy, transportation and postal services . The proposals are based upon the currently applicable directive 2004/17/EG regarding procurement of water, energy, transportation and postal services and 2004/18/EG regarding the award of public works contracts, public supply contracts and public service contracts.

The two new laws shall replace the law currently in effect regarding public procurement. It is proposed that the new stipulations come into effect on the 1st of January 2008.

The term “public procurement” means that a public institution, for example a state-run or municipal authority or certain public companies, buys goods, services or public works. The fundamental common legal principles which shall be observed for all public procurements are as follows.

- non – discrimination,
- equal treatment,
- transparency (openness and predictability),
- proportionality as well as,
- mutual recognition.

The public administrative court may, during an ongoing procurement and after a petition from a supplier/tenderer is submitted, determine that the procurement shall be redone in the case that the stipulations of the Swedish Public Procurement Act are not being followed and that there is a risk of damage to the given supplier/tenderer. An alternative decision from the court is that the procurement

may be concluded once a rectification has been made. If the supplier, following a concluded procurement, feels that he has suffered damages due to the procurement not having been done correctly, there is a means to demand compensatory damages via the public court.

2.4 Experiences of and Recommendations Regarding Strengthened Legal Recourse

The previous monitoring authority, NOU, has indicated that monitoring needs to be improved and furthermore in several investigations.

When NOU was formed in 1993, it was particularly emphasised that the monitoring authority's right to bring law suits in the beginning was not seen to be appropriate, but that the need for such would later outweigh the notion (prop. 1992/93:88).

NOU pointed out as early as 1995 in a letter to the government that new legal recourse was necessary in order to deal with the neglect of procurement regulations more efficiently. Among other things, there should be a means by which to intervene against prohibited award of contracts without prior publication of a contract notice and other serious behaviours, such as extending and reformulating contracts and maintaining expired contracts until further notice without any competition. The letter also criticised that the matter of establishing which organisations as procuring entities should be investigated.

NOU notified the government in 1999 that certain municipally owned companies did not regard themselves as procuring entities according to the Swedish Public Procurement Act, in spite of NOU's understanding. In the letter, NOU criticised its need to be able to identify the monitored subject and to be able to carry out an effective supervision of the organisations encompassed by the Swedish Public Procurement Act. In the context, it was also brought to mind that Swedish international commitments require that the procuring entities be able to be identified.

In addition, a series of investigations have pointed to the need to reinforce the legal recourse for the monitoring authority. Below are some examples.

National Audit Board 1997/98:3 Public Procurement The National Audit Board put forth that it was necessary to have an integrated supervision of public procurement. The government should be responsible for improving public procurements and making it more effective. The organisation for the monitoring of public procurements needed to be changed.

SOU 1999:139 More Effective Public Procurement – For Continued Welfare, Security and Growth The investigation presented four alternative organisational models and noted that integration into the Swedish Competition Authority is the more attractive model from a resource stand-point, by selecting an existing authority with a functioning administrative structure and the accompanying gains in coordination. The investigation recommended that the NOU with its operations within the inspection, development and information functions in the field of

procurements be merged with the Swedish Competition Authority. The new authority should be provided with new resources representing 9 – 12 years of manpower. The procurement committee also recommended that the monitoring authority in the field of procurement should be given the right to bring law suits for a market-damage fee for serious breaches of the regulations, such as prohibited award of contracts without prior publication of a contract notice.

SOU 2001:31 More Value for the Money, the Procurement Committee. The committee recommended that NOU merge with the Swedish Competition Authority and be restructured into a new agency. The new agency's monitoring operations in relation to public procurements shall be considerably extended. The agency shall be provided with the "muscle" and additional resources so that serious breaches of the statutory regulations regarding procurements can be prevented.

SOU 2004:47 Industry and Confidence, the Confidence Commission The Confidence Commission thought that the procurement committee's (SOU 1999:139) recommendation that the monitoring authority for the field of procurements should be given the right to bring law suits in court for a market-damage fee for serious breaches of regulation should be enacted.

The National Audit Board 2006:15 State-owned Companies and Public Procurement. The National Audit Board has examined whether or not the government and the monitoring authority, NOU, has ensured that the state-run companies encompassed by the Swedish Public Procurement Act carry out their procurements according to the regulations. Among the things stated in the report is that the NOU did not have the necessary preconditions for running an effective supervision of the companies. The government has also not ensured that there be effective remedies against procuring entities that do not follow the rules.

The Swedish Competition Authority 2006 Public Sector – Competition for Increased Growth and Efficiency. Among the things the authority put forth in its letter to the government was that there is a need for an increased investment in training, information and monitoring in the field. The monitoring authority should have the right to bring law suits in court for a market-damage fee for serious breaches and for principally vital procurement affairs in order to create case law. The centralised procurements within the public administration should be reviewed and regulation of state authorities' application of client and supplier methods should be d.

3 Development Tendencies

The procurement market is undergoing transformation and is affected by a number of important fundamental driving forces. What follows are some of the central trends and development tendencies.

3.1 Competition and Spin-offs

There is currently a clear trend within the municipal sector. More and more municipal and county councils are choosing to open their operations to competition by tendering out operations while introducing various forms of customer service models. In order to stimulate competition and increase the diversity on the market, certain municipal and county councils have, within the framework for a variety of competitive solutions, allowed "spin-offs" of certain publicly-funded operations.

The Swedish Competition Authority has noticed this development and in a report³ analysed the regulations pertinent to enterprise within the public sector with particular focus on the fields of patient-care and nursing care.

The report established that the free-choice model (or customer-choice model), in relation to the tender-model, can contribute to an increased enterprise and consumer power which leads to better competition and increased consumer benefit. This is a result of the obstacles to entering the fields being fewer and the designers being given the incitement to compete with quality. However, it can be established that the legal prerequisites for applying the free-choice model are unclear.

The Swedish Competition Authority recommends that a national law be introduced in favour for a free-choice model in primary patient-care and home help service with elderly care, with the exception of night and emergency on-call services. The Swedish Competition Authority recommends in its report that a particular law be introduced in favour of the free-choice model. The legal points remaining unclear in regard to the Swedish Public Procurement Act would thereby be avoided.

Several state examinations are currently working on these issues⁴.

³ Increase consumer satisfaction within patient and nursing care – a proposal for competition and increased enterprise, 2007:3.

⁴ E.g. free choice within elderly and handicap care, Committee directive 2007:38.

3.2 Environmental Requirements and Public Procurements

For some years now both within the EU and in Sweden, there have been active efforts to integrate environmental concern into public procurement. In the renewed EU strategy⁵ regarding sustainable development, the goal of promoting sustainable consumption and production is stated "to endeavour by 2010 to reach an average EU level in the matter of environmentally-suited public procurements that is as high as those member states who currently have accomplished most".

In the spring of 2007, the government decided upon a three-year action plan for environmentally adapted procurement as a result of the EU-commission within the integrated product policy having encouraged all member states to design their own national action plans. The action plans contain goals for the next three years and four strategic areas with measures to reach those goals. The measures entail, among other things, control of authorities, the involvement of politicians and other decision makers at the local and regional level as well as training and support to public procurers.

In the final consideration of the procurement investigation⁶, it was recommended that procuring entities should place environmental and social demands on the procurement to the extent that it is called for with respect to the nature of the procurement. The matter is currently being prepared within the Swedish government offices.

3.3 Ethical Requirements for Procurements

An increased involvement surrounding ethical regulations in public procurements can be noted. Among other things, the new requirements are about placing requirements demands on such things as working environment, equality, human rights and child labour within the framework of public procurements. This can take the form of requirements placed at the supplier qualification level, in the evaluation phase or as particular contract conditions.

It can even be about procurements of goods and services with ethical labelling; the Swedish *Rättvisemärkt*, Fair Trade or Rainforest Alliance. The rules establish that the suppliers must see to that such things as ILO's eight core conventions and the UN child convention is followed in those countries which produce the products.

⁵ EU renewed strategy for sustainable development from June 2006 (advisory document 10917/2/06)

⁶ New procurement regulations 2, SOU 2006:28

These further requirements make the procurements more complex and the legal status is currently unclear.

3.4 Simplification of Regulations

The government has initiated a comprehensive effort in simplifying the regulations. To this end, state authorities have been instructed to report on which regulation simplification measures can be taken. The Swedish Competition Authority has been given the mandate to present recommendations to the government on the 19th of October 2007.

It can already be stated that it is of utmost importance to look to enact simplifications within the regulations for public procurements. It has been noted that the regulations are regarded as complicated by small companies and smaller agencies. In the meantime, the Swedish Public Procurement Act is based on the EC directive which limits the possibilities for regulation simplification in the short term.

It can be stated that a series of the new environmental and ethical requirements in place can give rise to further complexity in the regulations, which can have negative effects on small and medium-sized businesses.

3.5 Electronic Procurement

In a report⁷, the EU commission has identified procurements as a prioritised area. The task force for electronic procurement which is connected to the commission's advisory committee has worked further with a series of issues in connection with this. The purpose is to facilitate and make efficient the tendering process both for suppliers as well as procuring entities. The goal is for all procurements regulated by EC procurement directive to be able to be made electronically by 2010 and that half of them actually are carried out electronically by then.

In the report from the IT standardisation investigation⁸, there are recommendations as to how electronic procurement can be reinforced.

In the final report for the government mandate which was originally given to the Swedish Agency for Administrative Development and which was transferred to Verva, about working for an increased use of electronic procurement, the notion was put forth that it was necessary for continued efforts to promote electronic procurement and in order to make a breakthrough in these plans in the new procurement regulations.

⁷ Report in 2010 e-Government action plan

⁸ The Invisible Infrastructure – regarding improved coordination of public IT standardisation, SOU 2007:47

3.6 Innovations and Public Procurements

In order to increase growth and competitiveness in Sweden, it is important to increase the opportunities for innovative solutions prior to a procurement as well as make use of the good examples there are and to draw from them. The insecurity characterising procurers who want to stimulate innovation is great, which places great demands on the procurers. They are both practical and theoretical in nature. Various means are available to deal with this, including things like dividing the tender into different parts, different structures for risk and risk distribution as well as various forms of creative contract conditions. The need for research and development is clear.

The Swedish Agency for Economic and Regional Growth (Nutek) and the Swedish Governmental Agency for Innovation Systems (Vinnova) has investigated⁹ how public procurements can contribute to increased innovation and creative renewal. The accounts of Nutek and Vinnova state that several reports indicate that public procurements today make up a large, unutilised opportunity for promoting innovation in private industry. Even within the EU commission, there is an ongoing effort in strengthen incentives for innovations within the field of procurements.

In the report mentioned above, the importance of strengthening the organisation and simplifying procedures for public procurements was emphasised. Furthermore, reliable information for following up and statistic should be brought forward. Small and medium-sized companies' innovation and efficiency potential shall be put to use.

3.7 Public-private partnership

Public-private partnership (PPP) means forms of cooperation between procuring entities and suppliers with the goal of securing financing, implementation, modernisation, administration or maintenance of an infrastructure and/or the provision of services. The PPP contract normal falls within the framework of the Swedish Public Procurement Act Typically, the contract amount to long-term project profiles with a high contract value and is most often complicated in legal and financial terms.

The Swedish Rail Authority, the Swedish National Road and Transport Institute (VTI) and the Swedish Road Administration have on commission by the

⁹ Nuteks report, Public procurement a motive force for innovation and renewal (2006:21) and Vinnova's report, Public procurement as a motive force for innovation and renewal (2006-01487)

government presented a report called "A Swedish Model for Public-Private Cooperation in Infrastructure Investments."

PPP has recently been applied in Sweden as well. This kind of procurement/financing solutions can be expected to increase in scope in Sweden. Matters regarding the compatibility of these solutions with the Swedish Public Procurement Act may therefore be actualised.

3.8 New Procurement Forms

Recently, new procurement forms have been developed.

The procurement investigation has in its final consideration¹⁰ recommended among other things that it shall be possible, in the case of a public procurement to use competitive dialogue, dynamic purchasing systems and electronic auctions. Even the question of the possibility of using purchasing centres for procurement is taken up. The proposals have been considered and the matters are currently prepared within the governmental offices.

3.9 Court Proceedings

The number of cases when a supplier appeals public procurements in court has increased dramatically in recent years. In order to analyse the development, the Swedish Competition Authority has produced a report¹¹ which among other things deals with the matter of the country administrative courts' custom regarding public procurements. The report shows that a number of appeal cases in given courts in recent years have increased dramatically.

The report further shows, which is serious from the social-economic perspective, that the county administrative courts to a great extent judge the same legal matters in completely different ways and that the judges are scantily motivated. Currently, there is not a well-developed legal custom.

The Swedish Competition Authority has therefore recommended that the government initiate an overview of the court structure as it pertains to procurements.

¹⁰ New procurement regulations 2, SOU 2006:28

¹¹ Administrative court judgments on public procurement, 2007:2.

4 The New Task

The Swedish Competition Authority has, as of the 1st of September 2007, taken over those tasks previously resting with the Public Procurement Board (NOU). The government has in its spring proposition and budget proposition set out guidelines for the activities of the Swedish Competition Authority in the field of procurement. In addition, the government has in its instruction and regulations defined the task.

4.1 The Spring Proposition and Budget Proposition

Among the things this year's spring proposition submitted to the government were the following.

"The Public Procurement Board is merged as of the 1st of September 2007 with the Swedish Competition Authority." A prioritised task is to increase the opportunities for small companies to take part in public procurements. In order for those business opportunities which public procurements entail to be able to be exploited by small and medium-sized business, it is important that these companies have the expertise and knowledge regarding public procurements and the regulations pertaining to these. It is also vital that the processes and requirements pertaining to public procurements, to the largest extent possible, are suited to the conditions of small and medium-sized companies. This is important even from a competitive perspective as an increased diversity contributes to an increased efficiency and lowered costs. The government estimates that the Swedish Competition Authority should be replenished with 5 million Swedish crowns per year from 2008 for investments aimed at making efficient public procurement and facilitating the participation of small companies in public procurements.

In order to create the conditions for an effective application of the procurement regulations, a functional legal recourse and means of remedy are needed. Preparations for an overview of the Swedish regulations regarding monitoring and court processes etc. due to the coming changes in the EU legal recourse directive are judged to be able to be started soon. "

In the budget proposal 2007/08:1 expenditures section 24, the government confirms the earlier texts that creating the conditions for and effective application and monitoring of the procurement regulations require functional legal recourse and means of remedy .

Accordingly, the government has declared that the purpose of the organisational change is to reinforce monitoring, which presupposes more effective legal recourse for the supervisory authority.

4.2 Instruction and Regulations

The Instruction

It is indicated in the instruction¹² of the Swedish Competition Authority that the agency is the administrative authority for public procurement. As part of the task, the Swedish Competition Authority shall work for an effective public procurement in the public interest and the players on the market.

The Swedish Competition Authority shall fulfil those tasks as follow in chapter 7. Article 9 of the Swedish Public Procurement Act, which is to say that to monitor public procurement and fulfil the tasks as follow from the law regarding intervention against unauthorised behaviour regarding public procurement. The Swedish Competition Authority shall, within the range of monitoring and general guidelines carried out to the appropriate extent, gather and process information for statistical purposes, follow international trends in the realm of procurement and support the government offices within the framework of a European and Nordic collaboration.

The Swedish Competition Authority shall to an appropriate extent inform companies and other interested parties about decisions in procurement matters, the application of the Swedish Public Procurement Act and EU procurement regulations.

The Swedish Competition Authority shall promote a competitive perspective and work for a consistent application of the national procurement regulations.

The Swedish Competition Authority is affiliated with an advisory board for procurement matters which shall comprise a forum for an exchange of experience in the matters pertaining both to general procurement matters and issues surrounding the need for measures to support the development of an effective public procurement.

The Regulations

On the 28th of June, the government made the decision to change the regulations for the Swedish Competition Authority effective the 1st of September 2007. It is stated in the regulations that the Swedish Competition Authority shall, in the field of procurement, work toward the following goals.

¹² Directive on change in the directive (SFS 1996:353) with instructions to the Swedish Competition Authority (2007:690)

- Actively work for an effective public procurement. The monitoring operation shall be prioritised and the agency shall above all note breaches of the regulations of great significance or of a principle interest.
- The agency shall furthermore report whether there is legislation and a custom contraindicating a public procurement and how in such a case it is expressed.
- The agency shall also follow and report on the legal development within public procurement both nationally and internationally.
- The Swedish Competition Authority shall provide general guidelines and information in the field of public procurement in order to prevent breaches of the regulations. Procuring entities and suppliers shall be prioritised.

4.3 The Wider Task

By integrating procurement matters with the Swedish Competition Authority's other tasks, the agency gets a wider mandate. This creates a series of benefits and enables a series of synergies, among them, the supervision of the procurement markets can point out both problems in the supply chain which can be dealt with by means of the Swedish Competition Act (SFS 1993:20) (KL) and problems at the procurement departments which can be dealt with by means of the Swedish Public Procurement Act. To this end, the Swedish Competition Authority's investigational, informational and research skills can be put to used within a wider field.

The Swedish Competition Authority shall work toward well-functioning markets through effective competition. By means of the agency's mandate now also encompassing procurement, the competition policy's task is widened to new players which creates conditions for an increased efficiency in Swedish competition policy.

5 The Expectations of Those Around

In the spring of 2007, the Swedish Competition Authority arranged a round-table meeting regarding the new mandate. Representatives of procurers, suppliers and consultants in the procurement field took part.

During the meeting, a number of important issues came up regarding monitoring and information regarding procurement issues. Among other things, it was established that the monitoring authority has an important role when it comes to spreading information about the development of the custom in Sweden and within the EU. During the meeting, it was also mentioned that the general advisory board could be a good instrument in providing guidance in certain cases.

The monitoring authority should focus on monitoring and make way for a private advisory and training market. During the discussion, it was brought up that the monitoring authority has an important roll to play when it comes to creating respect for the law and at the same time working for positive attitudes for procurement.

Some especially important points that came up in discussion were as follows.

- Suppliers want and expect a strong monitoring through increased powers for the monitoring authority.
- For smaller suppliers, the small company perspective is important when applying the Swedish Public Procurement Act. For example, the effects of large volumes when using the framework agreement and extensive requirements on the supplier in the procurement were mentioned.
- The Swedish Competition Authority should have a wide perspective and use its promotional task to improve the means and ability to use competition for procurements.
- There is a need as much as possible to work toward a simplification of the regulations and their application.
- Procuring entities expect and want more information and guidance.
- It is important to raise the status of procurers within the public administration.

It can be stated that the Swedish Competition Authority meets large and sometimes varying expectation among procurers and suppliers. The expectations can be difficult to satisfy.

6 Strategy and Direction

Based upon its new and broader mandate, The Swedish Competition Authority has defined the following strategy and direction of the procurement activity. The strategy and direction indicated in this document is not a finished product, rather an initial step toward developing the operation with procurement issues. The strategy shall be seen in a longer perspective.

6.1 Vision and Purpose

The vision of the Swedish Competition Authority is "Welfare through well-working markets".

This means that the Swedish Competition Authority is striving toward:

- procuring entities realise the opportunities with procurement and avoid breaching the Swedish Public Procurement Act by being aware of the regulations, have a high degree of morals in their procurement work and sensing that the risk of discovery and stiff remedy measuring in the event of a breach of the regulations is great,
- the competitive sector of the Swedish economy grows and the competitive solutions are applied to an increased extent in the public sector,
- suppliers have the opportunity and want to take part in procurements,
- Swedish consumers, procurement departments and suppliers know about the significance of competition for a varied selection goods and service of good quality at reasonable prices.
- The Swedish Competition Authority is one of the most effective agencies in Europe and has a high degree of competence when it comes to discovering, analysing and dealing with competition and procurement problems.

The Swedish Competition Authority's purpose is to work for well-functioning markets through effective competition in private and public enterprise for the benefit of the consumer as well as an effective public procurement in the public interest and that of the players in the market.

The Swedish Competition Authority's strategy for realising the vision is reported in the following stating how the agency intends to proceed. Reporting of the specific direction of the operation is also stating in certain central areas.

6.2 Goals of the Collaboration

Within the framework of the new broadened mandate, the Swedish Competition Authority will, among other things, focus upon further utilising synergies better the authority's various branches.

Among the goals stated in the Swedish Competition Authority's operational plan are the following: 31 December 2008.

- The Swedish Competition Authority has in its monitoring operations submitted concrete suggestions for measures to deal with problems.
- The Swedish Competition Authority's information and guidance is getting out and is appreciated.
- The Swedish Competition Authority has submitted proposals so that small and medium-sized companies have better opportunities to take part in public procurements.

6.3 Work for Effective Legal Recourse

An effective monitoring operation presupposes access to increased powers and more effective legal recourse than is available today. This understanding is supported both by the number of investigations and the auditor reports as well as by the suppliers. The monitor that has been carried out has not had the desired effect.

The Swedish Competition Authority wishes to emphasise that it is of essential importance that the monitoring authority in serious or principle cases have the right to sue in court. The very existence of such a means will likely have a preventive effect on procuring entities such that it will likely seldom need to be used.

The monitoring authority's lack of a right to sue means that confidence in the Swedish Public Procurement Act has diminished, in that procuring entities, that endeavour to apply the Swedish Public Procurement Act can be sued by a supplier, while a department which completely ignores the stipulations of the Swedish Public Procurement Act in practice does not run the same risk.

The Swedish Competition Authority is of the opinion that effective legal recourse must be introduced as soon as possible and that there is no reason to wait for the overhaul due to the new legal recourse directives.

Sweden has in relation to the EU committed itself to implementing adequate legal recourse regarding the legal recourse directives for public procurement which are

already in effect. The seriousness of the matter is illustrated, among other things, in that there is at least one complaint against Sweden, for a lack of implementation of the legal recourse directives which are currently administered by the EU commission.

The implementation of effective legal recourse shall lead to procurement departments refraining from breaches of the Swedish Public Procurement Act as well as an increase of suppliers wanting to take part in public procurements.

6.4 Work Toward Better Rules in Standardisation

In order to achieve a consistent application of the procurement regulations, the Swedish Competition Authority will consider issuing general advice. The Swedish Competition Authority has decided upon a general advisory board in the field of procurement pertaining to discrimination. The agency will look over which areas that could be eligible for further general advisory boards. When it comes to directives, the Swedish Competition Authority does not currently see any need to have the right to draft directives.

Better regulation lead to more suppliers wanting to participate in procurements at the same time as procuring entities refraining from breaching the Swedish Public Procurement Act.

In the standardisation realm, the Swedish Competition Authority will work to simplify the rules. This work must, in the short term, be aimed at looking for simplifications in the regulations in the Swedish Public Procurement Act not based on EC directives and when the EC directives form the basis of the Swedish Public Procurement Act, identify rules where Sweden can differ. It is also vital as much as possible to try to simplify the stipulations in the EC directive.

6.5 Work through Prioritised and Focussed Monitoring

Upon the establishment of strategic direction, the possibility to use synergies between various branches of operation is of importance. Procurement markets shall be given particular attention, even in the work of tracking and intervening against cartels.

In the field of procurement, the Swedish Competition Authority has identified and prioritised three strategic vital problem areas more monitoring efforts. These are:

- which organisations are encompassed by the Swedish Public Procurement Act (procuring authorities/ departments),
- illegal award of contracts without prior publication of a contract notice and

- the conditions for small and medium-sized companies to take part in public procurements.

This direction of monitoring can be expected to lead to procuring entities refraining from breaching the Swedish Public Procurement Act while suppliers can be expected to an increased extent to participate in public procurements.

The problem with procuring entities do not abiding by the courts decision in cases pertaining to the Swedish Public Procurement Act has been noticed. There are even examples of courts in their own procurements not having followed a decision from the administrative court about making procurements. Not being able to get at such behaviour naturally produces negative consequences for the confidence in the regulations.

Based upon the Swedish Competition Authority's general commission for working toward well-functioning markets and that procurement issues in this context are of great importance, the Swedish Competition Authority shall while awaiting the means of remedy , focus on the efforts which in a principle and general manner elucidate problems and recommend measures in order to get a better functioning public procurement. Individual procurements and problems noticed by the Swedish Competition Authority, for example during telephone inquiries, can be an important basis for prioritising more generally directed investigations and information gathering efforts. Those questions and problems brought forth in complaints and inquiries, written or by telephone, will therefore, regardless of any measures taken in the particular case, be used systematically to develop information on the agency's website in order to identify important areas for more general investigative efforts.

The Swedish Competition Authority will focus on the following areas.

Identifying procuring entities which act contrary to EC directives and Swedish law

The questions as to which are encompassed by the procurement regulations by means of being procuring entities is fundamental for the observance of the regulations and for effective procurement. According to a report by the National Audit Board called, State Companies and Public Procurement (2006:15), the NOU has had limited resources to execute an effective supervision of the state-run companies, since NOU did not have the means to issue remedies against the company in those cases that they break the rules. Nor does the NOU have the right to bring a matter further in court for trial. The National Audit Board points out that it is vital that state-run companies follow the Swedish Public Procurement Act so that the effects they are striving for with the law can be attained.

The Swedish Competition Authority will there begin such and investigation.

Identifying illegal award of contracts without prior publication of a contract notice on a systematic scale

One of the most important problems to correct is that of illegal award of contracts without prior publication of a contract notice, i.e. procuring entities which do not adhere to the procurement regulations. Many feel that this entails a large risk for appeal if one has done something wrong when one has tried to follow the regulations even if one completely refrains from making procurements in competition. Investigative efforts for mapping out and analysing the scope and the effects of award of contracts without prior publication of a contract notice should, based on this, be a prioritised monitoring task. Increasing the means of correcting prohibited award of contracts without prior publication of a contract notice can also be a way to minimise the risk for corrupt behaviour within the public sector.

The EU commission has actualised a matter regarding some municipalities' procurement of waste management services where the contract has been conferred without a public procurement. The market for waste management services is important and significant. The development of a well-functioning market in the area provides an opportunity for increased efficiency and increased environmental gains. The Swedish Competition Authority has begun an investigation of a few municipalities' purchase of waste management services from their own companies. The investigation will be directed in individual cases of violation and elucidation of the scope of illegal award of contracts without prior publication of a contract notice in the field.

Opening up for small companies in framework contract procurements

Framework contract procurements can be an effective way of handling unforeseen needs to procure goods and services. At the same time, a framework contract can – if used and structured wrong – can lead to greater costs for the procurers and to squeezing out small and medium-sized businesses.

The Swedish Competition Authority will prioritise state framework contract procurements within the framework of purchase coordination and start an investigation. The purpose is to open up for small companies in framework contract procurements

6.6 Work for Quick, Relevant and Current Information and Guidance

The Swedish Competition Authority shall provide general guidelines and information in the field of public procurement in order to prevent breaches of the regulations and to work for an effective public procurement. Information and guidance shall be quick, relevant and current.

The direction of the Swedish Competition Authority's information and guidance in procurement issues should be guided by the goal of getting a good observance of the regulations and a consistent application of the law. A particularly important area of information therefore applies to laws and the development of a case law in Sweden and within the EU. The work should also be directed with focus on that small and medium-sized companies' problems should be noted.

A central platform for information is the agency's website. It will be developed continuously with new functions and services.

The Swedish Competition Authority also provides information and guidance through statements and investigations, written and oral replies to inquiries, participation in conferences and seminars and through dispensing informational material.

This part of the operation shall observe that there is a growing private market for consultation and training directed both to procuring entities and suppliers.

In the following, a few current areas are developed where the Swedish Competition Authority should particularly be active by means of providing information and/or guidance.

New procurement legislation for 2008

New legislation in the field of procurement is proposed to come into effect on 1st January 2008. These new rules are complex and they will require great informational efforts. Further changes in procurement legislation is currently being examined within the government office. Once these changes come into effect, the need for information will again become large.

Competition and Spin-offs

The opening to competition, customer choice models and spin-offs are various models which aim to increase competition in the public sector. The Swedish Competition Board shall actively participate in the analysis and debate surrounding these issues with the goal of finding solutions for effective competition.

Environmental requirements

For the Swedish Competition Authority, the action plan established in the spring of 2007 will entail several contributions so that in cooperation with the Swedish Environmental Management Council it will produce informational material about environmental requirements, procurement legislations and legal matters.

Questions pertaining to environmental issues and public procurements will require a continued monitoring and skills development.

Ethical Requirements for Procurements

Various ethical requirements apply within the field of public procurements. One example of such is the Swedish *Rättsisemärkningen*. The matter has still not been tried by the EC courts.

The Swedish Competition Authority shall strive not to let these requirements impede the procurement process unnecessarily.

Public-Private Partnership (PPP)

Many initiatives with different compositions are underway in this area.

The Swedish Competition Authority will follow the development in Sweden and the EU. The Swedish Competition Authority will work for consistent definitions and concepts as well as clear rules in this area.

New Procurement Forms

The Swedish Competition Authority will follow the coming changes to the legislation, for the purpose of affecting the formulation of these. In this context, informational contributions may occur.

6.7 Increase Small and Medium-sized Companies' Participation in Procurements

In the government commission to the Swedish Competition Authority of the 28th of September 2007, a report shall also be submitted for those measures the authority intends to take in order to improve the opportunities for small and medium-sized companies to take part in public procurements. What follows are the considerations made by the Swedish Competition Authority in this regard.

Framework Contract and Purchase Collaboration

The opportunities for small and medium-sized companies to participate in public procurements affecting the development of the procurement markets: framework contracts, purchase collaboration and formulation of the inquiry bases can mean that the competition is not being used in an effect manner in that suppliers are unnecessarily being closed off.

The Swedish Competition Authority will start off on problems with a particular focus on identifying obstacles to small and medium-sized companies to take part in public procurements. This will take place within the framework of monitoring and standardisation as well as information/guidance.

Issues that can arise in the context are the effects of the framework contract and the consequences of requirements e.g. pertaining to environment and ethics which are placed on procurement departments.

Special Information Bound for Suppliers

The Swedish Competition Authority intends to design information material directed specifically to companies/suppliers about the new legislation in the field of procurements which are expected to come into effect at the turn of the year.

The Nutek web service, *Företagarguiden*, will be expanded with adapted information and a guide to public procurement. The Swedish Competition Authority intends to collaborate in its informational effort pursuant to the Nutek assignment.

Nutek's Assignment and Administrative Costs

The Swedish Competition Authority participates in a reference group affiliated with the NUTEK assignment of gauging the suppliers' administrative costs pursuant to the Swedish Public Procurement Act.

Innovations and Public Procurements

The Swedish Competition Authority will follow the development on the innovative front as well as investigate how this can be connected to the authority's goals and strategically important areas for monitoring and informational efforts. Through a greater use of so-called functional procurement, small and medium-sized companies' opportunities and interest in participating in procurements can increase. See more in section 6.10.

6.8 Work for an Increased Collaboration Between State Authorities

The National Audit Board examines procurements in its yearly audit. This activity amounts so closely to such monitoring that even the Swedish Competition Authority can do it. The Swedish Competition Authority therefore has, in conjunction with the National Audit Board, decided upon appropriate forms of collaboration. An exchange of information will take place on an ongoing basis of questions and procuring departments whose procurements should be examined.

Many governmental authorities have mandates within the field of procurement.

The Swedish Competition Authority cooperates with the Swedish National Financial Management Authority (ESV) regarding procurement issues in the economic-administrative evaluations of government authorities (EA evaluation).

It is vital that the Swedish Competition Authority work toward a refinement and an increased clarity when it comes to the distribution of roles even with regard to

other authorities in the field. The Swedish Competition Authority will therefore establish a collaborative effort with other authorities, such as Nutek, the Swedish Administrative Development Agency (Verva), the National Board of Trade and National Agency for Services to Universities.

6.9 EU and International Matters

As per instruction, the Swedish Competition Authority shall, follow international trend in the realm of procurement and support the government offices within the framework of a European and Nordic collaboration.

In order to fulfil the tasks within the monitoring and informational fields, it is vital that the Swedish Competition Authority take part in the European commission's advisory board for public procurements, as well as the work in the committee task forces (the task force for electronic trade and the task force for statistics and economy). For the Swedish Competition Authority's work with procurement issues, it is important to have a close connection to the government office and their counterpart agencies in the Nordic countries and the EU.

6.10 Work for Increased Research and Improved Statistics

The need for research and development in order to promote innovative solutions is clear. In a letter to the government on the 20th of June 2007, the Swedish Competition Authority, the Confederation of Swedish Enterprise, the Swedish Association of Local Authorities and Regions and the Public Procurement Board pointed to a few examples where there is a great need of research. This is among other this about the conditions to stimulate growth for small and medium-sized companies, the means to use procurements to reach various policy goals (for example, environmental goals), joint financing between private and public entities for various infrastructure projects and about the administrative burden for procurers and suppliers.

Among the points stated in the letter is that the Swedish Competition Authority spends 6.7 million Swedish crowns each year which is divided among various research projects which strive toward increasing awareness regarding competition issues. In connection with the Swedish Competition Authority on the 1st of September receiving a wider task and taking over responsibility for the operations which today is carried out by the Public Procurement Board, the four signatories to the letter state that the equivalent amount of money should be earmarked to research for public procurement.

Each year, Sweden shall submit statistics regarding public procurements to the EU and WTO. The responsibility for this has been placed on the Public Procurement Board which in turn commissioned the SCB to undertake the collection of current information. By agreement with the Swedish Competition Authority, the Public Procurement Board has engaged SCB to gather statistics also for 2007. The Swedish Competition Authority can state that better and more

pertinent statistics in the field are needed for this to form a basis for following the development of the procurement field. The Swedish Competition Authority intends to work for a development of collection and processing of procurement statistics.

7 A Continued Process

The strategy and direction indicated in this document is not a finished product, rather an initial step toward developing the operation with procurement issues. The strategy shall be seen in a longer perspective. The Swedish Competition Authority will follow up on this strategy and develop it in light of the experiences and points of view the authority receives. In order to design the operation in the best manner, a dialogue with the interested parties within the public sector will be necessary. The advisory board established by the Swedish Competition Authority is an important platform for this, but it must be supplemented with other activities.

7.1 The Advisory Board for Procurement Matters

The Swedish Competition Board has recently established an advisory board for procurement matters, with experts representing procuring entities, suppliers and the research community, as a forum for an exchange of experiences. The advisory board shall contribute to increasing understanding for purchasers' and suppliers' different roles and conditions. The new advisory board is expected to be an important aid in the work of the Swedish Competition Authority in monitoring public procurements. At the first meeting of the advisory board in October 2007, this strategy will form the basis of discussion.

7.2 Regional Conferences

The Swedish Competition Authority has identified the need to increase the contact area with interested parties around the country both to catch problems and to be able to give information about procurement issues. Competitive procurement is an issue affecting many. Based on this, the agency has in its action plan expressed an ambition to undertake regional visits.

In order for the Swedish Competition Authority to be able to design the operation in the best way, it is important that the regional contact area be utilised. This strategy as it is now formulated forms the platform for an important discussion with interested at the regional level. As a supervisory authority, it is vital that the agency get an insight into how the Swedish Public Procurement Act is applied and interpreted. This also provides good opportunities for various actors to elucidate current problems.

Such discussions provide an opportunity not only to give information about the new operation, disseminate information to procuring entities and other interested parties, but also to create a process for following up on and further developing the strategy.

Based on this, the Swedish Competition Authority will in cooperation with local public authorities arrange local conferences in order to hold in-depth discussions regarding the strategy and direction of the authority's operations. These discussions will also be utilised to present information about the new legislation which comes into effect in 2008.

The discussions will also deal with matters such as attitudes, knowledge, disposition and expectations on the Swedish Competition Authority as a supervisory authority for the Public Procurements Act. Other vital issues are apprehended competition problems in various procurement markets, cartel indications and the means for small companies to take part in procurements.

7.3 Dialogue

Procurement issues are often complex and at the same time under transformation. The Swedish Competition Authority therefore has reason to engage in a dialogue with important interested parties. The Swedish Competition Authority has in this context identified the need to increase the contact area with these interested parties both to catch problems and to be able to give information about procurement issues. Among these interested parties are the Swedish Association of Local Authorities and Regions, the Swedish Association of Public Purchasers (SOI) as well as a number of industry and interest organisations.

7.4 Final Comments

There is a polarisation between the various players in the procurement field, between procuring entities and tenderers/suppliers. This is reflected in the players' different expectations of the Swedish Competition Authority. Procuring entities expect detailed and complete information and guidance while suppliers want the agency mainly to initiate various monitoring projects.

The Swedish Competition Authority realises that with the current resources, there is a risk that none of the players involved will feel that it is adequate. A careful prioritising between both of these activities needs to be done so that the most necessary needs are satisfied.

Most procuring entities try to follow the law and custom. The regulations, however, are complex which makes for big risks of making a mistake, which can lead to appeals in the court. An appeal often entail great drawback for the procuring department, among them that the acquisition need must be pushed up.

The supplier sometimes feels that the procurement did not go right. The Swedish Competition Authority often gets questions from suppliers who feel wronged by what the monitoring authority intends to take as measures leading from an exposed breach of the Swedish Public Procurement Act. Currently, the agency has no other means but to receive petitions and possibly initiate an investigation.

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2007-09-28 Dnr 488/2007 30 (30)

It is especially vital that the Swedish Competition Authority quick get access to legal recourse in order to be able to intervene where the agency finds that serious violations have occurred.