# Towards Enhanced Interaction between Public Procurement and Competition Law - Some Proposals from a Swedish Perspective

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# 1 INTRODUCTION

This paper 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.

In his book, Albert Sánchez Graells gives the following introduction, which is also very well suited to serve as introduction to the present paper:

"[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."[2]

The present paper will analyse the interaction between public procurement and competition law from a Swedish perspective and from a number of different angles.

Swedish public procurement in the classical sector is governed by the Swedish Public Procurement Act which entered into force in 2008. In this paper, the Act will be referred to as **LOU** which is the established Swedish abbreviation for "Lag (2007:1091) om offentlig upphandling".[3] LOU implements Directive 2004/18/EC concerning the coordination of award procedures in the classical sector.[4] In this paper, this Directive will be referred to as the **Classical Sector Directive.**

Swedish public procurement in the utilities sector is governed by the Swedish Procurement Act in the Areas of Water, Energy, Transports and Postal Services. In this paper, the Act will be referred to as **LUF**, which is the established Swedish abbreviation for "Lag (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster". LUF implements Directive 2004/17/EC coordinating the procurement procedures in the utilities sector.[5] In this paper, this Directive will be referred to as the **Utilities Sector Directive**.

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

[3] The Swedish Competition Authority has published an introduction to LOU in English *(The Swedish Competition Rules – an introduction)*, which can be downloaded under: http://www.kkv.se/t/IFramePage____1687.aspx . The leading Swedish introductory textbook in the field of public procurement law is Kristian Pedersen, *Upphandlingens grunder* (Jure Förlag AB, second edition, 2011). The leading handbook is Jan-Erik Falk, *Lag om offentlig upphandling – en kommentar* (Jure Förlag AB, second edition, 2011. For a recent handbook in English on EU and Danish public procurement law, see Sune Troels Poulsen, Peter Stig Jakobsen and Simon Evers Kalsmose-Hjelmborg, *EU Public Procurement Law* (DJØF Publishing, second edition, 2012).

[4] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[5] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

# 2 FRAMEWORK AGREEMENTS AND COMPETITION ASPECTS

## 2.1 Competition Aspects of Framework Agreements under Art 32 (2) of the Classical Sector Directive

As to competition aspects of framework agreements, Article 32 (2) of the Classical Sector Directive stipulates the following:

"The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement. Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition."

The first element in this quotation concerns the issue of too long framework agreements, which will be analysed in the following sub-section.

The second element in this quotation is of relevance for the issue of too large framework agreements, which will be analysed subsequently.

## 2.2 Too Long Framework Agreements

### 2.2.1 Swedish and EU law on too long framework agreements

The provisions of Article 32 (2) of the Classical Sector Directive have been implemented into Swedish law by LOU Chapter 5, Article 3 which stipulates:

"A framework agreement may only run for a period of more than four years if there are special reasons."

In the subsequent sub-section, recent Swedish case law as to framework agreements having a duration of more than four years will be presented.

### 2.2.2 Swedish case law on too long framework agreements

#### 2.2.2.1 The Vaccination Case of 2011 – Stockholm Administrative Court of Appeal[6]

The Swedish counties organised a public procurement proceeding concerning vaccination services by way of a framework agreement. The duration of the framework agreement was two years, which could be prolonged by 24 months and then an additional six months. The maximum duration of the framework agreement would thus be 4 years and six months, i.e. six months longer than the four years stipulated in LOU Chapter 5, Article 3. The Stockholm Administrative Court of Appeal found that the counties had not shown any special reasons related to the object of the agreement for applying a duration of more than four years. Potential health hazards related to the

[6] Judgment of the Stockholm Administrative Court of Appeal in Case 5609-5629-10, *Sanofi Pasteur MSD S.N.C.* v *Stockholms läns landsting and Others*, of 23 March 2011.

absence of contract during a renewed public procurement proceeding should not be considered, as such reasons do not relate to the object of the framework agreement. As to the effects on competition of too long framework agreements, the Court found that **"the longer duration may limit competition on the market in question in an undue way and that the claimant therefore could suffer harm**."[7] On these grounds, the Court decided that the public procurement proceeding should be redone.

#### 2.2.2.2 The Insurance Case of 2011 – Karlstad Administrative Court [8]

The cities of Filipstad and Kristinehamn undertook a public procurement proceeding concerning the administration of pensions and insurance services. The framework agreement was to have a duration of three years, with possible prolongations of up to three additional years. The maximum total duration of the framework agreement was thus six years. The Karlstad Administrative Court found that the cities had not proven the existence of any special reasons justifying such a long duration. The Court therefore decided that the public procurement proceeding had to be redone.

#### 2.2.2.3 The SharePoint Case of 2012 – Malmö Administrative Court[9]

VA Syd undertook a public procurement proceeding concerning SharePoint development services governed by LUF. The duration of the framework contract was to be two years plus potential prolongations leading to a maximum duration of seven years. The Malmö Administrative Court stated that there is no explicit upper limit to the duration of framework of agreements in the Utilities Directive and LUF, but that the provisions of a maximum time duration of four years stipulated by LOU could be taken as a point of departure when assessing framework agreements with long duration under LUF**.** The Court then stated the following:

"The possibilities to use framework agreements having a duration of more than four years are probably more far-reaching in public procurement proceedings under LUF than under LOU, because contracts governed by LUF often by their nature are complex, of very high value and of significance for important functions in society, which could justify a longer duration. **However, the use of framework agreements may not lead to adverse effects on competition.** The seven years' duration of the framework agreement applied by VA Syd is remarkably long in relation to the object of the procurement proceeding. The Administrative Court has not found any circumstances justifying such a long duration of the framework agreement. The long duration of the framework agreement as applied by VA Syd **has therefore restricted competition in an un-proportionate way** and has infringed [the general principles of public procurement stipulated in] LUF Chapter 1, Article 24".[10] (author's translation, emphasis added)

On these grounds, the Court decided that the public procurement proceeding had to be redone.

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[7] Page 12 of the judgment.
[8] Judgment of the Karlstad Administrative Court in Case 2873-11 E, KPA Pensionsservice AB v Filipstad kommun and Kristinehamn kommun, of 1 September 2011. The judgment was appealed to the Göteborg Administrative Court, which rejected the appeal on procedural grounds (Judgment of the Göteborg Administrative Court of Appeal in Case 6427-11, *Livförsäkringaktiebolaget Skandia* and *Skandikon Administration AB* v *Filipstads kommun*, of 9 November 2011).
[9] Judgment of the Malmö Administrative Court in Case 3065-12 E, *Bouvet Syd AB* v *VA SYD*, of 4 May 2012.
[10] Page 7 of the judgment.

### 2.2.3 Conclusions on the Swedish case law on too long framework agreements

It follows from Swedish case law that framework agreements with durations exceeding four years are compatible with LOU only if the contracting authority can prove that there are special reasons related to the object of the procurement proceeding to justify the long duration. Moreover, it appears that it is quite difficult for contracting authorities to prove this.

## 2.3 Too Large Framework Agreements

### 2.3.1 Swedish and EU law on too large framework agreements

As mentioned above, Article 32 (2) of the Classical Sector Directive stipulates that "contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition." As very large framework agreements may have the effect of restricting competition, too large framework agreements may infringe Article 32 (2) of the Classical Sector Directive.

Whereas the provisions of Article 32 (2) of the Classical Sector Directive concerning too long framework agreements have been implemented into Swedish law as set out in the previous section, the provisions of Article 32 (2) of relevance for too large frameworks, i.e. the duty not to restrict competition, have not been explicitly implemented into the Swedish Public Procurement Act – LOU.

However, it follows from the *travaux préparatoires* that the Swedish legislator intended that also the provisions concerning the duty not to restrict competition embodied in Article 32 (2) of the Classical Sector Directive should be applicable in Swedish law.

The *travaux préparatoires* states the following*:*

"According to Article 32 (2), contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. This does not refer to the contracting authority's intention as to the use of framework agreements, but to the effects which can be stated. **The contracting authority therefore must consider how to design a framework agreement in order to obtain competition. For this reason it may, for example, be inappropriate to sign joint framework agreements with few suppliers on behalf of all contracting authorities, as this can lead to the creation of a situation comparable to a monopoly**."[11] (author's translation, emphasis added)

In the draft legislation sent to the Swedish Council on Legislation (Lagrådet), there was an explicit provision implementing the provisions of Article 32 (2) of the Directive as to the duty not to restrict competition. However, the Swedish Council on Legislation considered such a provision to be superfluous, as it considered that the duty not to restrict competition in relation to framework agreements already follows from the general principles of public procurement listed in LOU Chapter 1, Article 9.[12] In view of the Council's opinion, the Swedish legislator decided not to include any explicit provision concerning provisions of Article 32 (2) of the Directive as to the duty not to

[11] Prop 2006/07:128, p. 172.
[12] Prop 2006/07:128, p. 333.

restrict competition. However, it clearly follows from the *travaux préparatoires* that the Swedish legislator intended to give full effect to these provisions.

## 2.4 Case Law on Too Large Framework Agreements

### 2.4.1 The Children Dental Care Case of 1999 - Supreme Administrative Court[13]

The county of Kronoberg undertook a public procurement proceeding concerning the provision of dental services to approximately 22 000 children and young persons up to the age of nineteen. The framework agreement's initial duration was to be three years, with an option to prolong it up to a total duration of six years. The dental services were to be performed in ten specific geographical areas. Only tenders covering all of the ten geographical areas were to be accepted. The Swedish Supreme Administrative Court found that the procurement proceeding was designed in such a way that, in practice, only the incumbent service provider had the possibility to submit a tender. The Court then stated the following:

"The Swedish Supreme Administrative Court considers that the county, by requesting that tenders should cover all of the dental care in question, infringed the provisions of Chapter 1, Article 4 of [the former] Swedish Public Procurement Act[14] as to the **obligation to conduct procurement proceedings in a way which utilizes the existing possibilities for competition** and in a business-like way. No relevant reasons for not accepting tenders also on parts of the dental care in question have been advanced." (author's translation and emphasis)

On these grounds, the Swedish Supreme Administrative Court decided that the public procurement proceeding had to be redone.[15]

### 2.4.2 The Nursing Home Case of 2009 – Göteborg Administrative Court of Appeal[16]

Kommunförbundet Skåne undertook a public procurement proceeding concerning nursing home services. Björkviks Vårdhem AB argued, among other things, that the procurement proceeding infringed the Swedish Public Procurement Act (LOU), because of the very wide geographic area to be covered by the framework agreement, which, according to Björkviks Vårdhem AB, would lead to less competition in the long run. The Göteborg Administrative Court of Appeal stated the following:

"As to Björkvik's argument that the public procurement proceeding because of its size (geographic dimension) will restrict competition in the long run, the Göteborg Administrative Court of Appeal finds as follows. According to LOU Chapter 1, Article 9, contracting authorities

[13] Judgment of the Supreme Administrative Court in Case 1999, RÅ not 1, *Kronobergs läns landsting* v *Anders Englund Tandläkarpraktik AB*, of 12 January 1999.
[14] Chapter 1, Paper 4, first paragraph, of the former Swedish Public Procurement Act, Lag (1992:1528) om offentlig upphandling, stipulated as follows: "Procurement proceedings shall be conducted in a way which makes use of the existing possibilities for competition and in a businesslike way."
[15] The Swedish Supreme Administrative Court also mentioned two additional grounds: The duration of the framework agreement of up to six years was too long and the time available for submitting tenders was too short.
[16] Judgment of the Göteborg Administrative Court of Appeal in Case 6411-08, *Björkviks Vårdhem AB* v *Kommunförbundet Skåne*, of 7 April 2009. The author of this paper worked at that time as Associated Judge at the Göteborg Administrative Court of Appeal and served as one of three judges giving judgment in this case.

shall treat suppliers in an equal and non-discriminatory manner and shall conduct procurements in a transparent manner. Furthermore, the principles of mutual recognition and proportionality shall be observed in connection with procurements. **Effective competition both in the short as in the long run is one of the purposes of competition law. The fact that the size of a public procurement proceeding may lead to a situation where tenderers which are not awarded a contract risk market exit, which in its turn may lead to less competition in the future, is in view of the Göteborg Administrative Court of Appeal not a fact which in itself can constitute an infringement of the said principles.**"[17] (author's translation and emphasis)

This judgment is interesting as it states that effective competition both in the short as in the long run is one of the purposes of competition law. Nevertheless the Göteborg Administrative Court of Appeal finds that *long-term* negative effects of competition are not covered by the general principles of public procurement. In other words, contracting authorities could not be compelled by administrative courts applying the Swedish Public Procurement Acts to take into account the potential long-run adverse effects on competition when determining the size of public procurement proceeding.

### 2.4.3 The Skåne Postal Services Case of 2011 – Göteborg Administrative Court of Appeal[18]

Kommunförbundet Skåne conducted a public procurement proceeding concerning the provision of postal services to all municipalities in Skåne and 43 companies owned by municipalities. One tenderer – Bring CityMail Sweden AB – complained, arguing that the criterion demanding tenderers to leave an offer on all sub-categories to have a chance of being awarded the contract was both un-proportionate and a hindrance to competition. The Göteborg Administrative Court of Appeal agreed and found this condition to be in breach of the principle of proportionality. The Göteborg Administrative Court of Appeal in this respect upheld the prior judgment by the Administrative District Court of Malmö[19]. The Malmö Administrative District Court had stated that in order to be in line with the principle of proportionality the public authority has to clearly state, when setting requirements, why a certain requirement is necessary to fulfil the purpose of the public procurement contract. The Malmö Administrative Court also stated that the contracting authority has to bear in mind that it has to utilize competition as far as possible so that the range of potential tenderers is not decreased more than necessary.[20]

[17] Page 13 of the judgment. The Göteborg Administrative Court of Appeal found that the public procurement proceeding had to be redone on other grounds related to the principles of transparence and equality.
[18] Judgment of the Göteborg Administrative Court of Appeal in Case 3952-10, *Kommunförbundet Skåne* v *Bring CityMail Sweden AB*, of 24 January 2011.
[19] Judgment of the Administrative Court of Malmö in Case 9491-10 of 23 July 2010.
[20] For an in-depth analysis of this case, see Carl Bokwall and Per-Owe Arvwedson, "Konkurrensbegränsande ramavtal, med särskild inriktning på postmarknaden – analys", published on www.jpinfonet.se on 9 February 2011. The authors acted as attorneys to Bring Citymail AB.

### 2.4.4 The SKL Kommentus Printer and Copying Machines Case of 2012 – Legal opinion of the Swedish Competition Authority[21]

SKL Kommentus Inköpscentral AB conducted a joint public procurement procedure concerning printers and copying machines. The framework agreement was to cover 21 different geographic areas and it was possible to submit tenders for individual geographic areas. In an annex to the contract specifications, 70 contracting authorities were listed, all of which had indicated an interest to adhere to the framework agreement. Another annex contained the name of no less than 1 077 contracting authorities which had not indicated any interest to adhere to the framework agreement, but should have the possibility to join the framework agreement at a later stage. Toshiba TEC Nordic AB complained to the Stockholm Administrative Court[22] which requested a legal opinion from the Swedish Competition Authority. In its legal opinion, the Swedish Competition Authority found that it was contrary to public procurement law to "use a list of contracting authorities which may order items from the framework agreement without the contracting authorities actively having committed themselves to do so in advance or that such orders could be anticipated by other means".[23]

The legal opinion of the Swedish Competition Authority contains the following very interesting general analysis on the duty not to restrict competition under Article 32 (2) of the Classical Sector Directive:

"The Swedish Competition Authority considers that the general clause contained in Article 32 (2) fifth subparagraph of the Classical Sector Directive according to which framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition, can be regarded as counterweight to the risks of adverse effects on competition which framework agreements under certain circumstances normally can entail. The existence of the general clause can be regarded as a way to highlight the importance to respect the general principles when conduction public procurement proceedings by way of framework agreements.

However, the Swedish Competition Authority does not share the view of the Swedish Council on Legislation and the Swedish Government that the general clause in Article 32 (2) fifth subparagraph *only* states what is already stipulated by the general principles of public procurement in LOU Chapter 1, Article 9.

The Swedish Competition Authority considers that the general clause in Article 32 (2) fifth subparagraph instead should be interpreted in a way - which goes beyond what is already stipulated by the general principles of public procurement law - by imposing *other* and *more far-reaching* obligations as to the actions of contracting authorities related to public procurement proceedings by way of framework agreements. That the EU legislator has prescribed such an order is in line with the inherent risks of adverse effects on competition which procurements by way of framework agreements under certain circumstances normally can entail.

For example, very large framework agreements which – without any objectively acceptable reasons – exclude other suppliers than the – or which can seriously harm competition through suppliers not being awarded a contract risk to vanish from the market in question, could be

[21] Legal opinion of the Swedish Competition Authority of 30 May 2012, ref. 285/2012, requested by the Stockholm Administrative Court in Case 1857-12, *Toshiba TEC Nordic AB* v *SKL Kommentus Inköpscentral AB*. This excellent legal opinion was drafted by Legal Counsellor Daniel Johansson and adopted by the director general of the Swedish Competition Authority, Dan Sjöblom.
[22] The case number at the Stockholm Administrative Court is 1857-12. At the time this paper was finalised, the Court had not yet delivered its judgment.
[23] Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, para. 54.

subject to intervention by administrative courts of appeal under Article 32 (2) fifth subparagraph of the Classical Sector Directive even if the general principles of public procurement under LOU Chapter 1, Article 9 have not been infringed. In such a case it may be necessary for the court to give direct effect to the general clause in Article 32 (2) fifth subparagraph of the Classical Sector Directive, because it has not been implemented into LOU and LOU lacks provisions which can be interpreted in accordance with the wording and purpose of the general clause."[24]

The circumstances discussed by the Swedish Competition Authority – risk for adverse effects on competition in the long run caused by suppliers not being awarded a contract having to exit from the market – may have been present in the Nursing Home Case of 2009 mentioned above.[25] Here, the Göteborg Administrative Court of Appeal, in view of the author (who served as one of three judges in the case), rightly found that none of the general principles referred to in LOU Chapter 1, Article 9 impose any obligation on a contracting authority to consider such *long-run* effects on competition which may materialise after a given framework agreement comes to an end. Moreover, it is not astonishing that the Göteborg Administrative Court of Appeal refrained from discussing whether to give direct effect to Article 32 (2) fifth subparagraph of the Classical Sector Directive and to consider whether the potential long-run anti-competitive effects were contrary to that provision. One reason for this is that the Swedish Public Procurement Act is generally perceived as compatible with the Classical Sector Directive in the Swedish judicial community. In practice, it will therefore normally take a precedent judgment from the Swedish Supreme Administrative Court or a legal opinion from the Swedish Competition Authority - such as in the present case - before Swedish administrative courts start applying provisions which are not in line with the Swedish Public Procurement Act, by way of giving direct effects to provisions in the directives.

As to the duty not to restrict competition under Article 32 (2) of the Classical Sector Directive applied to the circumstances of the case, the Swedish Competition Authority stated:

"As a result of the framework agreement, competition for a potentially very large part of the entire public sector's purchases of printers and photocopying machines as well as related services take place at a single occasion, instead of market participants are given the possibility to compete for supplies at different times during these four years.

Moreover, as to goods and services covered by the framework agreement, only orders concerning exactly those products and services can be placed, and only in the way stipulated in the framework agreement; these will exclude alternative products, designs and solutions which could have met the needs of the contracting authorities as well or better. This leads to a situation where the suppliers' incentives to create innovative solutions, better processes and better quality will be diminished.

The very large amount of *uncertain* authorities entitled to place orders based on the framework agreement in the second annex (1 077 authorities) as compared to the number of authorities entitled to place order (70 authorities) makes it difficult for many suppliers – in particular small and medium-sized – to even calculate reasonable tender prices and to plan which resources are needed in order to deliver the amounts which subsequently may be ordered.

[24] Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, paras 33-36.
[25] Judgment of the Göteborg Administrative Court of Appeal in Case 6411-08, *Björkviks Vårdhem AB* v *Kommunförbundet Skåne*, of 7 April 2009. The author of this paper worked at that time as Associated Judge at the Göteborg Administrative Court of Appeal and served as one of three judges giving judgment in this case.

In conclusion, the Swedish Competition Authority considers, in view of what has been stated in paragraphs 57-59 above, that the public procurement proceeding by way of framework agreement conducted by SKL Kommentus Inköpscentral AB risks to be improper or to prevent, restrict or distort competition and therefore to be incompatible with the general clause in Article 32 (2) fifth subparagraph of the Classical Sector Directive."[26]

## 2.5 Proposal to Amend the Swedish Public Procurement Act Highlighting the Duty Not to Restrict Competition, in Particular by Means of Too Large Framework Agreements

Large joint public procurement proceedings may have adverse effects on competition for various reasons. One of these effects has been described in a book by Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell as follows:

"[C]oordination among buyers can lead to increased concentration on the seller side. … If the public sector is a relatively small actor on the market, this kind of risk related to coordination is probably small. If, however, the public sector is the only buyer or the totally dominant buyer, this is an aspect to take into consideration. Far-reaching coordination can bring short-term benefits for the buyers, but to a price of increased concentration and thus higher prices in the future."[27]

The adverse effects of too large framework agreements have been described very well in an opinion written by Ulrica Dyrke at Företagarna[28] as follows:

"Företagarna considers that the design of framework agreements has large consequences as to the possibilities of small undertakings to compete for contracts with the public sector. We have a large, and apparently growing, use of procurement by means of joint framework agreements in Sweden. Procurement by means of joint framework agreements normally involves large contracts with a duration of several years. Of particular importance in this respect is the coordination of purchases among Government authorities. Large joint framework agreements risk making it impossible for small undertakings to participate, because they for obvious reasons often face difficulties to compete if there are requirements concerning large volumes and large geographic coverage. …

Företagarna would like to point out in this regard that it follows from the directive in the classical sector as well as from the *travaux préparatoires* to LOU that a contracting authority may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition. **Företagarna considers that an explicit provision in this respect should be added into the Swedish Act on Public Procurement.**

**The point of departure for Företagarna is that as a rule, every contracting authority should conduct public procurement proceedings on its own.** Such separate procurement proceedings are more small-scale, which in turn creates opportunities for reasonable requirements making it possible for small undertakings to participate. Procurement proceedings by way of joint framework agreements should be used very restrictively and only if it is expected to lead to overall better final results for the concerned authorities."[29] (author's translation and emphasis)

[26] Legal opinion issued by the Swedish Competition Authority on 30 May 2012 in Case 285/2012, paras 57-60.
[27] Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell, *Offentlig upphandling På rätt sätt och till rätt pris* (Lund, Studentlitteratur AB, 2011), p. 102.
[28] The Swedish Federation of Business Owners.
[29] Opinion submitted by the organisation Företagarna on 27 January 2012 to the Swedish Public Procurement Law Committee, p. 6-7.

In view of the above-mentioned potential adverse effects on competition and the present uncertainty and lack of clarity caused by a lack of proper implementation of Article 32 (2) of the Classical Sector, it is proposed that the Swedish Public Procurement Act is amended, adding a provision stipulating that ”contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition”. Moreover, it should be considered also to include agreements in general, which would lead to the following extended wording: “Contracting authorities may not use agreements or framework agreements improperly or in such a way as to prevent, restrict or distort competition”. In that case, the provisions could be added as a new subparagraph to LOU Chapter 1, Article 9, referring to the classical principles of public procurement law. As to the competition principle embodied in the Classical Sector Directive, this principle will be dealt with in section 4.3 below.

This paper focuses on the potential anti-competitive effects of joint framework agreements which may occur under certain circumstances. However, it should be borne in mind that joint framework agreements also have many advantages. Whether a given joint public procurement proceeding in fact is good or bad for competition depends very much on the specific circumstances in each case. This is indeed the overriding conclusion presented by Mats Bergman, Johan Y. Stake and Hans Christian Sundelin Svendsen in an empirical study on joint framework agreements commissioned by the Swedish Competition Authority and published in 2010.[30]

## 3 THE COMPETITION PRINCIPLE AND THE PURPOSE OF PUBLIC PROCUREMENT LAW

As to the purpose of EU Public Procurement Law, the CJEU has stated:

“It is apparent from the second and tenth recitals in the preamble to Directive 93/37 that coordination seeks the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts **and the development, at the Community level, of effective competition** in that field, by promoting the widest possible expression of interest among contractors in the Member States”[31] (emphasis added)

The Stockholm Administrative Court of Appeal has in February 2011 stated the following as to the purpose of public procurement law:

“LOU shall be interpreted and applied in accordance with the purpose and wording of the public procurement directives as well as the case law of the CJEU. The main purpose of EU public procurement law is freedom of movement for goods and services and that the area shall be opened for non-distorted competition. **Both LOU and the EU directives aim at public procurement proceedings to be conducted by utilizing existing competition in the best way. The provisions aim both at making use of competition in a given public procurement proceeding and developing effective competition.**

[30] Mats Bergman, Johan Y. Stake and Hans Christian Sundelin Svendsen, *Samordnade ramavtal – en empirisk undersökning,* published in the Reports Series of the Swedish Competition Authority in 2010, 2010:5, p. 86.
[31] Judgment of 16 December 2008 in Case C-213/08 *Michaniki* AE, para. 39.

The purpose of LOU [Chapter 11] Article 11 is to enable contracting authorities to control that the suppliers which have submitted a tender have the capacity to perform, before the tenders are evaluated. In order to meet the **main purpose of LOU, to foster competition**, the means of proving technical capacity have been limited by making the list of means exhaustive."[32] (author's translation and emphasis)

Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell have summarized the purpose of public procurement law as follows:

"The main idea behind public procurement is thus, put it simply, to let potential suppliers compete in an open, equal and neutral way for public contracts, thereby creating more value for money. … **Hence, it is obvious that the attainment of a competitive situation on the Internal Market which is the rules' overriding aim**, but well-functioning competition normally also lead to the contracting authorities being able to get better deals. … **All of the five general EU principles have as their direct or indirect purpose to ensure what can be called effective competition**, but as to the principles of equal treatment, transparency and mutual recognition this is particularly clear. A contracting authority may not limit different undertakings' possibilities to be considered on equal terms as supplier in relation to public procurement proceedings."[33] (author's translation)

Albert Sánchez Graells has made the following points as to the role of competition in public procurement law:

"Both competition law and public procurement have been the object of a certain instrumentalisation and have sometimes been used to promote 'secondary' policies or goals, eminently of a social or industrial nature. In the case of competition law, these goals have been almost unanimously dropped in recent years and a 'more economic' approach has clearly been embraced (particularly in the EU). In public procurement, the issue of the pursuit of secondary policies is still unsettled – but, in our view, a growing consensus towards minimizing this instrumental use of public procurement is identifiable (and, at any rate, seems the preferable option from a normative perspective). Finally, in the case of the EU, both sets of economic regulation have traditionally been significantly influenced by the goal of market integration – however, given the completion of the internal market process and the relative maturity of the system, the relevance of this goal is fading away in both cases, and is (re-) opening spaces that permit focusing on their 'core' objectives. In view of the substantial commonality of objectives, the protection of competition as a means to maximize economic efficiency and, ultimately, social welfare has been identified as the core common goal of both sets of economic regulation and as the ultimate foundation or aim for the development of a more integrated approach towards competition and public procurement law. Even if it may require a certain adjustability and trade-offs with complementary goals of public procurement (such as the transparency and efficiency of the system), a revision from a competition perspective is consistent with the basic goals and function of public procurement."[34]

The following extracts from the recitals to the Classical Sector Directive are of particular interest when analysing the role assigned to competition by the EU legislator in the field of public procurement:

[32] Judgment of the Stockholm Administrative Court of Appeal in Case 6528-10, *AB Familjebostäder* v *Berendsen Textil Service AB*, on 2 February 2011, p. 4.
[33] Mats Bergman, Tobias Indén, Sofia Lundberg and Tom Madell, *Offentlig upphandling På rätt sätt och till rätt pris* (Lund, Studentlitteratur AB, 2011), p. 15, 41-42 and 50.

[34] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 394-395.

*Recital 2 – opening-up of public procurement to competition*

”The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and **to guarantee the opening-up of public procurement to competition**. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.” (emphasis added)

*Recital 4 – no distortion of competition*

”Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract **does not cause any distortion of competition** in relation to private tenderers.” (emphasis added)

*Recital 36 – effective competition*

**“To ensure development of effective competition in the field of public contracts**, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto.”[35] (emphasis added)

The following extracts from Articles of the Classical Sector Directive are of particular interest when analysing the role assigned to competition by the EU legislator in the field of public procurement:

*Art 23 (2) - Technical specifications shall not have unjustified adverse effects on competition*

”Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the **opening up of public procurement to competition**.” (emphasis added)

*Article 32 (2) – The duty not to restrict competition when using framework agreements*

”Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.”

As set out above, Article 32 (2) of the Classical Sector Directive imposes a duty on contracting authorities to ensure that their framework agreements do not have anti-competitive effects. If only Article 32 (2) is considered, it may seem reasonable to make an *e contrario* interpretation, which would lead to the view that contracting authorities

[35] Recital 36 of the Classical Sector Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works

are allowed to ignore the effects on competition if they choose to use agreements instead of framework agreements. It is obvious that the anti-competitive effects of a large agreement may be more adverse than those of a very small framework agreement.

An *e contrario interpretation* could have been justified if the Directive included no other competition obligations as to other aspects of public procurement. However, this is not the case. According to Article 23 (2) of the Directive, contracting authorities are equally obliged to ensure that technical specifications do not result in unjustified anti-competitive effects. Hence, the provision in Article 32 (2) of the Directive does not constitute an exception to the rule, but is consistent with an overall competition principle embedded in the Directive, in particular in the above-mentioned recitals.

Albert Sánchez Graells has written the following on the role of the competition principle embodied in EU Public Procurement law:

"The inquiry has shown – after reviewing current EU legislation and its interpretative case law – how **the EU public procurement directives have an embedded competition principle that constitutes a specification and makes direct reference to competition as a general principle of EU law – which serves the fundamental purpose of establishing the fundamental link between EU competition law and EU public procurement** law (which are to be seen as complementary sets of regulation that do not hold a special relationship *stricto sensu*). The competition principles offers the formal legal basis for the introduction and full enforcement of competition considerations in the public procurement setting, but the substance or content of that principles (i.e. its requirements and implications) need to be determined according to the general principles and criteria of EU competition law. In this regard, it has been submitted, that, according to this principle of competition, *EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit or distort competition – and contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition."*[36] (emphasis in bold added by author)

In an article published in *Europarättslig Tidskrift* in 2002, Michael Slavicek, the then General Counsel at the Swedish National Board for Public Procurement, argued the following:

"The Swedish Public Procurement Law is often referred to as a complement to competition law. This is not really true. A competitive and well-functioning market is certainly a condition for receiving good tenders. **However, contracting authorities shall not create well-functioning competition, but just utilize the competition which exists**."[37] (author's translation and emphasis)

This view has for a long time been treated as a truism in the Swedish public procurement community. However, as this paper has tried to show, this is not really true anymore. Contracting authorities cannot take competition for granted and just utilize competition at hand. In fact, contracting authorities are not only passive market spectators but active market participants whose actions may significantly affect market conditions and competition.

[36] Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, 2011), p. 396-397.
[37] Michael Slavicek, "Upphandlingens olika ansikten" (2002), 1 *Europarättslig Tidskrift* p. 17-18.

The competition principle embodied in the Classical Sector Directive imposes an active obligation to ensure that the way they conduct public procurement proceedings is pro-competitive and not anti-competitive. Swedish administrative courts should therefore not treat the Directive's pro-competition provisions as soft law but as hard law, in the sense that infringements of the competition principle should be considered as infringements of the Swedish Public Procurement Act, in the same way as infringements of, e.g. the principles of proportionality and equality.

The Danish Associate Professor in Competition Law, Grith Skovgaard Ølykke, has made the following conclusion in a recent book on the modernisation of public procurement law – which is also very well suited to serve as a conclusion to the present section:

"[W]hen the Commission has finally explicitly acknowledged the importance of undistorted competition between tenderers for the efficiency of public procurement procedures, it is necessary to go all the way and institutionalise competition law assessments in public procurement procedures. This institutionalisation could by through the oversight body or through increasing the role of National Competition Authorities in public procurement procedures; however, it is submitted that the most optimal solution would be to integrate the oversight bodies and the National Competition Authorities."[38]

## 4 CONCLUSIONS

The main conclusions of this paper are as follows:

- The Swedish Public Procurement Act should be amended highlighting the duty not to restrict competition in connection to framework agreements embodied under Art 32 (2) of the Classical Sector Directive. This duty should be transferred from soft law to a hard legal ground for court intervention in case of breach.

- The competition principle embodied in the Classical Sector Directive imposes an active obligation to ensure that the way contracting authorities conduct public procurement proceedings is pro-competitive and not anti-competitive. Swedish administrative courts should therefore not treat the Directive's pro-competition provisions as soft law but as hard law in the sense that infringements of the competition principle should be considered as infringements of the Swedish Public Procurement Act in the same way as infringements of, e.g. the principles of proportionality and equality.

[38] Grith Skovgaard Ølykke, "How Should the Relation between Public Procurement and Competition Law Be Addressed in the New Directive?", published *in EU Procurement Directives – modernisation, growth & innovation, Discussions on the 2011 Proposals for the Public Procurement Directives*, edited by Ølykke, Risvig & Tvarnö (DJØF Publishing, 2012), p. 83-84. For an in-depth analysis of competition aspects of abnormallyh low tenders, see Grith Skovgaard Ølykke's book *on Abnormally low tenders with an emphasis on public tenderers* (DJØF Publishing, 2010).