

Competition neutrality between public and private entities - Experiences from Sweden

My name is Johan Jonzon and I work for the Swedish Competition Authority (SCA). I would like to take the opportunity to thank you for your invitation and for arranging this eminent conference and panel discussion. We are following closely the growing interest in instigating measures in order to ensure competition neutrality between public and private entities. I am a legal case officer and project manager for several bigger projects at the SCA and I mainly work with competition neutrality between public and private entities. I will hold a short presentation about the Swedish legal framework, the discussions prior to its implementation and how it has come to be interpreted by the courts.

The Swedish provisions in this area came about after many years of discussions. Foremost small and medium sized businesses had for a long time raised their concerns about unfair competition from the public sphere. Their experience was that they lost contracts and business to public entities because they had difficulties offering the same favorable conditions that the public sector could. The argument was that an actor within the public sphere has advantages that the private sector doesn't. An actor run buy a municipality can for example enjoy large economies of scale that the municipality gains from delivering public services at large when it's competing with the private sector. Public entities can also cover losses from tax revenue and enjoy very favorable borrowing terms when investing. This is something a private entity cannot compete with.

The provisions are now contained in the Swedish Competition Act and have been in force since 2010, which means it's a relatively new piece of legislation. The rules are applicable to a public actor or a publicly controlled entity which is engaged in sales activities in a manner that distorts or impedes actual or potential competition. The Competition Authority can go to court to ban such activities. A ban can only be ordered by the court if the activity is not compatible with the law or the conduct is not justifiable on public interest grounds.

The law applies to public actors, including the state, a municipality or a county council and other bodies that the state, a municipality or a county council has decisive influence over. Economic and sales activities covered by the rules correspond to the concept of an "undertaking" in EU competition law. They concern activities of an economic and commercial nature. The rules only apply to sales activities and not to purchases.

Restriction of competition refers to an activity or conduct that distorts or impedes - actually or potentially - competition or the conditions for effective competition.

A few words on how the provisions have come to be interpreted in practice. To begin with, it should be noted that public entities have in several cases chosen to modify or remove the contested activities before the SCA has taken any measures.

If the public entity in question does not modify its behavior then the SCA has the option of bringing proceedings before the court. The Stockholm City Court is the first instance, and the second and final instance is the Market Court. The SCA has not been invested with the power to make decisions on its own in this area.

I will briefly refer to two cases. The first case is called Skelleftebuss. It was a judgment in the first instance that was not appealed. It concerned a municipally-owned company that acted in the area of charter traffic, and which arranged bus tours to private entities in need of transportation. The court ruled in favor of the SCA and concluded that the activity was not in accordance with the law and that it distorted competition. It therefore banned the activity.

The second example is a judgment concerning a municipality that refused to grant a private company access to a fire practice area that was necessary in order to arrange a certain kind of training exercise. The Stockholm City Court dismissed the action but the Market Court ruled in favor of the SCA. The municipality was ordered to grant private entities access to the contested practice area. The court ruled that competition was distorted because the municipality did not grant access. The jurisprudence is still being established in the courts and it is unclear how the provisions will be interpreted.

A few concluding words on some issues that we're currently dealing with. We experience difficulties in convincing companies to testify in court against the behavior of a public entity since their main contractor may actually be, for example, the municipality. There is also a problem in determining how much tax revenue is flowing in to a publicly-owned economic entity since there is no requirement for separate accounts between, for example, a municipality's public activities and its economic activities on competitive markets. It is therefore difficult to prove in court to what extent an economic entity receives public funds. Finally, there is also a problem of lack of knowledge about the provisions. That is why this conference and similar initiatives are most commendable.

Thank you for your attention!