
June 2012

New legislation on the direct award of contracts to affiliated companies

On the 10th of May 2012 the Swedish parliament decided on the enactment of a permanent exemption in the Swedish Public Procurement Act (2007:1091) ("LOU") for the direct award of contracts to affiliated companies¹. The parliament also decided to enact a possibility for municipalities and county councils to delegate the competence to make decisions in relation to public procurement procedures to central purchasing bodies. The new rules will enter into force on the first of January 2013 but the rules on direct award to affiliated companies will be retroactively applicable also to awards made prior to this date.

The main rule is that all purchases of goods, services or works made by a contracting authority shall be preceded by a procurement procedure in accordance with LOU. This applies in relation to all suppliers, i.e. including affiliated companies, such as for example wholly owned subsidiaries of the contracting authority. There are however a number of exemptions from this rule. One of these exemptions is the one stated in chapter 2 section 10 a LOU, meaning that certain procuring authorities' purchases from affiliated companies are exempted from the public procurement rules if certain criteria are fulfilled.

The rules now decided by the parliament will replace the previous temporary exemption in chapter 2 section 10 a LOU, and differ to some extent from the temporary exemption.

The new rules are applicable to all contracts concluded between a contracting authority and a legal person or joint committee (according to the Swedish local government act, "KL") provided that

1. The contracting authority exercise control over the legal person or the joint committee similar to the that which it exercise over its own departments (the control-criterion) and
2. The legal person or the joint committee carries out the essential part of its activities with the controlling contracting authority or authorities (the activity criterion).

¹Preparatory work: Prop. 2011/12:106, Offentlig upphandling från eget företag – och vissa andra frågor.

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Both the control and activity criterion have been developed in the case-law of the Court of Justice of the European Union ("CJEU") and are sometimes referred to as the Teckal-criteria since that where first discussed by the court in case C-107/98 Teckal.

The biggest difference compared to the current exemption in LOU is that the new exemption can be applied by all types of contracting authorities, i.e. not only state and local authorities, but also bodies governed by public law, such as municipal companies. The new rules also make it possible to abstain from procurement in "reverse situations", i.e. where the controlled entity purchases goods, services or works from the contracting authority exercising control.

It is however, according to the governments assessment in the preparatory works, more uncertain if the exemption can be used for horizontal awards, i.e. awards between two sister companies in a group of affiliated companies, which are both under the control of the same contracting authority and carry out the essential part of their activities with this authority. On the one hand, the functional view point of the CJEU, suggests that there would be room for allowing an exemption also in these situations. On the other hand it is difficult to claim that two sister companies exercise control over one another in accordance with the control-criterion. In the opinion of the government this question will have to be resolved by the courts, and ultimately by the CJEU.

The parliament's decision also means that KL will be amended in some regards. Through the new rules the council of municipal and county councils will be obligated to ensure that the purpose of a certain company owned by a municipal or a county council will be stated in the articles of association, together with the local government principals that controlling the company in question.

Furthermore, the articles of association shall contain an obligation for the company to seek the opinion of the council when making decisions of principle importance.

Thereafter the municipal executive board shall on a yearly basis decide on whether each company has conducted its activities in accordance with the local government principles and if these activities have been in accordance with the purpose of the company as stated in the articles of association. This decision shall be presented to the council together with the annual financial statements of the company. If the municipal executive board finds that the activities of a certain company has gone beyond the purpose of the company or the local government principles, the executive board shall leave suggestions as to what measures should be taken to correct this development.

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The new rules in KL increase the possibility for municipals and county councils to exercise control over their companies. These control measures will most likely make it easier for municipals and county councils to ensure that the control-criterion in the Teckal exemption is fulfilled. The new rules in KL can therefore be said to work as a complement to the new rules in chapter 2 section 10 a of LOU.

Finally the parliament's decision makes it possible for municipals and county councils to delegate the competence to make decisions in relation to public procurement procedures to central purchasing bodies, i.e. to contracting authorities that procure on the behalf of others. Due to certain limitations in KL this has not been previously not been possible and municipalities and county councils have been forced to make their own award decisions in public procurements. This has been very burdensome in larger coordinated procurements with several contracting authorities. The new rules will take care of this problem by allowing municipals and county councils to delegate the right to make award decision to central purchasing bodies.

All in all it can be said that the new rules, both in LOU and KL, are in agreement with the previous proposals of the OFUKI-committee² and thus does not offer any big surprises. Our assessment is that the rules will lead to an increase in legal certainty and predictability in some aspects that have previously been uncertain. There are, however, some remaining questions regarding how the Teckal criteria will be interpreted and applied by the courts. It is, inter alia, uncertain if awards can be made between sister companies in a municipal company group without procurement according to LOU.



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