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# European Public Procurement: CJEU Rules Utilities Directive Applicable to Public Railway Transportation Services

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At the request of the Swedish Supreme Administrative Court, the Court of Justice of the European Union (CJEU) recently issued a preliminary ruling in a case pursued by the Swedish Competition Authority (SCA) against SJ AB (SJ), the Swedish state-owned railway company. The preliminary ruling clarifies the scope of EU's directive on utilities procurement, which is expected to impact all transportation operators with the same legal and *de facto* position like SJ. It also represents the first ruling regarding procurement directives from a Swedish national court.

**Facts**

The case derived from a project that the SCA conducted about how state-owned companies comply with procurement legislation. Due to its significant purchases, SJ became a target of the SCA's investigation. The SCA, in essence, argued that SJ was subject to the EU procurement requirements because SJ (1) is a public procuring body in the eyes of the utilities directive, and (2) SJ's activities are considered as providing service under operating conditions laid down by a competent authority of an EU Member State regarding a transport network in accordance with Article 5(1) of Directive 2004/17.

The relevant paragraph in Article 5(1) of Directive 2004/17 reads as follows:

*This directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus, or cable (first subparagraph).*

*As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service (second subparagraph).*

The Administrative Court in Stockholm (effectively the equivalent of the U.S. Boards of Contracts Appeal), as well as Administrative Court of Appeal in Stockholm, ruled in favor of SJ. The SCA brought an appeal before the Swedish Supreme Administrative Court, requesting that the court refer the matter to the CJEU. The Supreme Court, in making the requested referral, asked two questions:

1. Must the second subparagraph of Article 5(1) of Directive 2004/17 be interpreted as meaning that there is a network in the field of transport services when transport services, on a state-administered rail network for national and international rail traffic, are provided in accordance with provisions in national legislation that implement Directive 2012/34 involving the allocation of railway infrastructure capacity on the basis of requests from railway companies and a requirement that all requests are to be met so far as possible?

2. Must the first subparagraph of Article 5(1) of Directive 2004/17 be interpreted as meaning that an activity carried out by a railway company, such as is referenced in Directive 2012/34 and entails the provision of transport services to the public on a rail network, constitutes the provision or operation of a network as referred to in that provision of the directive?

**CJEU's Assessment (issued February 28, 2019)**

Regarding the first question, the CJEU noted that the arguments invoked by SJ , cannot, even if established to be accurate, exclude that the conditions under which SJ provides its services are determined by a competent authority.

The CJEU concluded that Article 5(1) of Directive 2004/17 must be interpreted as meaning that there is a network of rail transport services, within the meaning of that provision, where transport services are provided in application of national legislation transposing Directive 2012/34, on a railway infrastructure managed by a national authority that allocates infrastructure capacity even if that authority is required to meet the requests of railway companies provided that the limits of that capacity are not reached.

Regarding the second question, CJEU found that the activity of the 'operation of networks' refers to the exercise of the right of use of the railway network for the provision of transport services, while the activity of 'provision of networks' refers to the management of the network. Hence, Article 5(1) Directive 2004/17 is interpreted so that 'operation of networks' refers to the railway undertaking, while 'a provision of networks' is a prerogative of the infrastructure manager.

**Legal Analysis & Consequences**

Whether or not railway companies shall apply the procurement rules for the utilities sector, has been a frequent question in the Member States, with railway companies making different assessments in this regard. Nonetheless in 1988, the European Commission, in its proposals for two original directives in the utilities sector, included a list of which state railway companies were considered as contracting entities in accordance with the first utilities directive 90/531/EEC. The list included by way of example, the Danish State Railways (DSB), Deutsche Bundesbahn (DB), and the Societe nationale des Chemins de fer francais (SNCF).

However, to date, the question has stayed away from the CJEU's review, and the issue has basically only been assessed a few times in the national and EU courts — the most widely known being the Alstom case from the England and Wales High Court of Justice concerning the Eurostar high-speed railway service under the English Channel.

In our opinion, the CJEU's preliminary ruling is a welcome clarification about the scope of the utilities directive. Clearly, the procurement rules cover procuring entities, which provide transportation services on railway to the public when the allocation of railway infrastructure capacity is established by a competent authority. If no such allocation of railway infrastructure capacity is established, the train undertaking is not obligated to apply the procurement rules.

Hence, the preliminary ruling will impact other entities with the same legal and *de facto* position as SJ. Such undertakings must carry out advertised procurements according to the common EU or national procurement rules that apply for the utilities sector.

Needless to say, this will affect many Member States, including Sweden, since EU state-owned railway companies carry out their activities within many EU countries. This also raises the question whether companies from non-EU Members states have another status because they do not fall under the jurisprudence of the CJEU.

To avoid putting the utilities directive's rationale at risk, we believe that this consequence will likely not be applicable when railway companies take part in a procurement as bidders. This is the case in Sweden when the regional public transport authorities procure railway public transportation. The authorities can then end up in precarious situations with review procedures and appeals in several stages both at the level of the authority, as well as on the level of the bidder . This risk may delay awards in such procurements. This will also ultimately counteract competition since there is a risk that state-owned entities will not be able to submit competitive tenders in such procurements, or even worse, not be able to submit a tender in time at all.

In parallel, it should also be observed that SJ and other similar public companies may apply for an exemption from applying procurement rules at the European Commission for the undertaking's parts of the business that are subject to competitive pressure.

**Conclusion**

SJ's activities are covered by the procurement rules in the utilities sector. SJ and other public companies will have to apply procurement rules for their acquisitions. We assess that there are two methods to avoid such consequences, specifically (1) to clarify that CJEU's conclusion do not apply where state-owned companies participate in procurements as bidders, and (2) to apply for exemptions, where the railway activities are subject to competition.

**Footnotes**

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[1] State-owned companies are fairly common in Sweden. They are expected to be funded by their sales, and not be given direct tax money.

[2] SJ argued inter alia that it provides rail transport services in full competition on the market and does not receive any state funding, that it obtains its revenue from sale of tickets, that it has no priority regarding railway capacity when requesting allocation of railway infrastructure capacity, and that all the transport that it operates results from its own decisions.

[3] To avoid any confusion, both the authority and the bidder are procuring entities.