

Swedish train operating company a railway network operator for the purposes of EU procurement law (Konkurrensverket v SJ AB)

06/03/2019

Local Government analysis: Court of Justice decides that Swedish State Train Operating Company (TOC) is an operator of a network and therefore subject to EU procurement law when awarding contracts for the cleaning of its trains. Written by Adam Heppinstall, Barrister, Henderson Chambers.

Konkurrensverket v SJ AB [C-388/17](#)

What are the practical implications of this case?

This is an interesting decision which might cause something of a stir within the Train Operating Companies (TOCs) in the UK. It has been thought by some that one reason why these TOCs were not subject to EU procurement law was because they did not operate the railway network, as that is the role of Network Rail. It would appear from this judgment that operating the trains on the network is sufficient to be an operator of the network, and therefore this might bring TOCs within the procurement regime. It is important to be hesitant though, because this judgment relates to the particular features of the Swedish national railway scheme and there is insufficient information within the judgment to determine how similar that is to our own railway network scheme.

What was the background?

The Swedish State Railway company, SJ AB, awarded two contracts worth around £5.5m and £5.9m each for the cleaning of its trains. It did so without going through a procurement exercise as generally mandated by EU law. This was challenged by the Appellant (the Swedish procurement supervisory authority) who said that SJ AB should have advertised the contracts in the usual way and in not doing so, should be fined. The Administrative Court in Stockholm and the Stockholm Administrative Court of Appeal held in favour of SJ and the matter came before the Swedish Supreme Administrative Court who referred the matter to the Court of Justice. EU procurement law procedures are required to be followed by those entities who either provide a railway network or operate that network by providing railway services to the public (see [Articles 2 and 5](#) Directive 2004/17/EC) SJ AB argued that while it was a state-funded operator of train services, it was not an operator of a train network, because that was another state body (Trafikverket) which granted it access to the network on request. It also argued that because Trafikverket did not control its operations, the Swedish railway network did not come within the definition of a network within the Procurement Directive (which required that the relevant authority such as Trafikverket lays down conditions as to the routes to be served, the capacity to be made available or the frequency of service.)

What did the court decide?

The Court of Justice concluded that while Trafikverket was the provider of the network, SJ AB was the operator of that network by way of the provision of train services, and thus had to follow procurement procedures in awarding train cleaning contracts. Further, it found that while SJ AB does have freedom to operate to some extent, it was still subject to being granted access to the network by Trafikverket, and therefore 'while accepting that the railway undertaking has a certain freedom to determine the conditions for the exercise of its transport activity, it must be held having regard to the obligations and restrictions on it, taken as a whole, in particular the obligation of obtaining train paths and the conditions attached thereto, that the conditions under which it operates the transport service are laid by a competent authority of a Member State, in this case the Trafikverket...' (para 41)

Case details:

- Court: Court of Justice (Ninth Chamber)
- Judge: C. Lycourgos, E. Juhász and C. Vajda, M. Campos Sánchez-Bordona
- Date of judgment: 28 February 2019

[Adam Heppinstall](#) is a barrister at Henderson Chambers, and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact caseanalysis@lexisnexis.co.uk.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

FREE TRIAL