Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises

Matrix explaining how social considerations have been embedded in the Swedish law transposing Directive 24/2014/EU

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Contents

Article 18(2) of the Directive ► Act (2016:1145) on Public Procurement, Chapter 17, Sections 2-5			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority shall, if necessary, require the supplier to perform the contract in accordance with the terms and conditions of pay, vacation and working time that the employees who perform the work under the contract shall at least be insured. *The authority shall also require the supplier to ensure that its subcontractors who directly contribute to fulfilling the contract meet the conditions set out in the first paragraph.* (Act (2016:1145) on Public Procurement, Chapter 17, Section 2) *The levels of the conditions in section 2 shall be the minimum level according to a central collective agreement that is applied to the whole of Sweden for equivalent employees in the relevant branch of industry.* *When a contracting authority is specifying the level of conditions, it shall give the central labour organization and the employer's organization that are parties in the relevant collective agreement the opportunity to give their opinion on the levels of the conditions, where this is not deemed unnecessary.* *If it is not possible to specify the levels of the conditions in Section 2 the contracting authority is not obliged to set these conditions.* (Ch. 17 Sec. 3) *A contracting authority shall, if necessary, require the supplier to perform the contract under specified terms in accordance with the ILO Core Conventions, if the work is performed under such conditions that Swedish labour law is not applicable.* *The authority shall also require the supplier to ensure that its subcontractors who directly contribute to*	The contracting authority is allowed to require more far-reaching conditions provided that the requirement is compatible with the EU principles. It should also be permissible to set minimum labour requirements although it is not necessary, i.e. there is no danger of these obligations being violated by the supplier or subcontractors.	The terms referred to are the minimum conditions in terms of wages, leave and working hours. Occupational pension is not included in these minimum conditions. It is mandatory for the contracting authority to require that the supplier abides by these conditions when necessary, i.e. where there is a danger of non-compliance with the minimum labour standard. The requirements in the public procurement must correspond with the levels of conditions in a central collective agreement that is applied to the whole of Sweden, both public and private employers. The contracting authority is obliged to approach the parties of the collective agreement in order to establish the levels of conditions. This could be unnecessary, if the Swedish National Agency for Public Procurement has already produced a guide that gives this information. If the contracting authority is unable to get an exact information of what the levels are (for example, the parties of the collective agreement are at odds on how it should be interpreted), the authority is not obliged to set conditions it cannot establish with certainty. There can be more than one central collective agreement that apply to	Although art. 18(2) also includes environmental and social obligations only the obligations in the field of labour law have generated provisions in the Swedish Act on public procurement in the process of implementing art. 18(2). The reason for the lack of any provisions specifically implementing art. 18(2) In regards of environmental and other social obligations but labour obligations, might be that these obligations are considered to be sufficiently implemented through other provisions, such as the provision on exclusion if the tenderer has not complied with environmental, social and labour obligations and the provision on rejecting abnormally low tenders if it is established that the tenderer does not comply with these obligations. It is fair to say that the implementation of Article 18(2) into the Swedish Public Procurement Act entailed a special challenge due to the peculiarity of Swedish labour legislation and of the Swedish labour market. Conditions of employment are indeed regulated in Swedish law such as the Employment Protection Act (lagen om anställningsskydd), Co-Determination Act (medbestämmandelagen), the Leave Act (semesterlagen) and the Working hours' code (arbetstidslagen). However, the level of the working conditions is largely fixed in collective agreements that in many aspects take over the law. As an example there is no statutory minimum wage in Sweden. There is actually no legislation stipulating that wages should be paid at all. The conditions of employment, as well as, wages, including minimum wages, are therefore determined in the collective agreements. Many

fulfilling the contract meet the conditions set out in the first paragraph. (Ch. 17 Sec. 4) *Even if the specific labour conditions are not met, a supplier shall be deemed to fulfill the terms if it applies the corresponding terms in one and the same central collective agreement applicable throughout Sweden to the corresponding employees in the industry in question.* *The supplier shall also be deemed to comply with the employment conditions if it is an employer who falls within the scope of the Act (1999: 678) on posting of workers and the supplier applies the corresponding terms of employment and employment terms under the same law.* (Ch. 17 Sec. 5)		the same employees and the same branch of industry. A supplier who fulfills the equivalent conditions in another central collective agreement is deemed to comply with the requirements of the contracting authority although the terms the supplier complies with are identical. This follows from the principle that all collective agreements are equal. It is enough for a supplier that uses posting workers to abide by the terms that follows on from the Act on posting of workers.	collective agreements in the white collar sector do not even have provisions on minimum wages. Moreover, there is no system in Sweden to declare collective agreements to be a general rule. In some sectors there are competing collective agreements. One of the many challenges for the contracting authority is to establish the levels of labour conditions it requires in a tendering which is dependent on the branch of industry concerned (for example which wage it can require when the tendering is directed to a sector where there are no collective agreements, competing collective agreements or the collective agreements do not entail any provisions on minimum wages).

Open questions	One question is when more far-reaching requirements are compatible with EU law. There is some discussion if contracts under the thresholds are also included by the obligations of Article 18(2). There is some uncertainty regarding which workers and which subcontractors are included. According to the legislator the requirements may only cover workers and subcontractors that will be engaged in the execution of the contract. There is also an ongoing debate if it is in breach with EU law and the principle of proportionality for a contracting authority to require that a private contractor must actually sign a collective agreement. There is not much case law on these provisions largely because they have not been in force for long and actually came into force at a later date (2017-06-01) than the rest of the law. This was due to the fact that the first proposal of the government regarding labour obligations was rejected by the parliament. I know of one judgement made 2018-03-12 by the Administrative Court of Appeal of Stockholm in case no. 6023-17. The case concerned the question of whether it was permissible for a contracting authority to require that taxi-drivers in a contract of transportation of children and elderly people were given a salary based on working hours and not based on the numbers of fares. The justification for not allowing a wage based on the number of fares was that it could lead to a rush that would affect security and the reception of the customers. Although the collective agreement allowed both models of payment the court found that the requirement was compatible with the Act on Public Procurement as well as the principles of EU-law.
Example of application from the national level (where applicable)	It is not allowed to require that the supplier signs a collective agreement. At least this is the dominating opinion among Swedish lawyers. It is not allowed to include employees and subcontractors that do not directly contribute to the performance of a contract since their work is not sufficiently linked to the contract. It is not allowed to set conditions that are not from a collective agreement other than a central collective agreement that is applied to the whole of Sweden for equivalent employees in the relevant branch of industry. It is not allowed to require Swedish conditions, not even minimum conditions, when the contract is performed outside of Sweden. It is not allowed to set more far-reaching conditions of employment when the supplier falls within the directive on posting of workers.

Article 20 of the Directive ►Act (2016:1145) on Public Procurement, Chapter 4, Section 18			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority may *1. reserve the participation in a tendering to sheltered workshops or for suppliers whose main purpose is social and professional integration of persons with disabilities or persons who are unable to enter the labour market; or* *2. prescribe that a contract is to be completed within the framework of a program of protected employment.* *A prerequisite for a supplier to participate in a procurement according to the first paragraph is that at least 30 percent of those employed in the protected workshop, at the supplier or in the program for sheltered employment are persons with disabilities or persons who are unable to enter the labour market.* (Act (2016:1145) on Public Procurement, Chapter 4, Section 18)	This provision allows the possibility to transpose exclusive participation in procedure and performance of contracts for such workshops, economic operators and programmes. This provision also applies to tendering according to chapter 19 of the Act on Public Procurement, i.e. the chapter that regulates tendering under the thresholds and tendering of social and other specific services.	This provision aims to foster participation of procurement contracts for sheltered workshops and economic operators active in social and professional integration of disabled or disadvantaged persons. Performance of such contracts may also occur in the context of sheltered employment programmes. The prerequisites in the second paragraph shall be upheld not only in the tendering process but also during the performance of the contract. It is appropriate to regulate this in the contract, i.e. that the contract can be annulled if the supplier fails to fulfill one or both of these prerequisites at any time during the duration of the contract. It is not necessary that at least 30 percent of the working force actually performing the contract belong to the categories: persons with disabilities or persons who are unable to enter the labour market. It is enough that at least 30 percent of the working force of the organization as a whole belong to these two categories. Actually no one in the working force performing the contract need to belong to any of these categories as long as the supplier fulfills the criteria in the provision. The Swedish legislator has chosen not to use the concept “disadvantaged persons” since it is considered to be vague and improper.	There are a number of labour market policy programmes administrated by the Swedish Public Employment Service for the most vulnerable on the labour market, such as subsidies for employers who engage people with disabilities or people who due to other reasons are unable to enter the labour market. The regulation that deals with programs for persons with disabilities which result in reduced working capacity is of special relevance. The specific measures under this regulation are aimed at persons with disabilities who have reduced working capacity and who fulfill the special conditions that apply to each aid or effort (Section 9). The support and efforts that can be mentioned in this context are wage subsidies (25-31§§), protected work (32-35§§), development employment (36-36 d§§) and safety employment (37 and 37b §§). Many of the employers who engage persons with disabilities or persons who, due to other reasons, are unable to enter the labour market fit into the definition of suppliers whose main purpose is social and professional integration of persons with disabilities or persons who are unable to enter the labour market. These organizations are predominantly non-profit and engaged in different branches of industry such as second hand, handicraft and catering. One could say that they have two business ideas, one to conduct a business activity and the other to provide work rehabilitation. Apart from employing people with the help of different labour programmes governed by the Swedish Employment Service these organizations also get financial support from the local authorities who have a statutory obligation to

			create opportunities for the disabled and unemployed to enter the labour market. There is also the state-owned sheltered workshop Samhall AB whose core business is to create work for people with functional impairment leading to a reduced working capacity. According to the articles of association of Samhall AB profits shall be capitalized on a new account to promote the new operations of the company. Samhall AB receives financial aid from the state that has recently been reviewed and criticized by the Commission for not being fully congruent with EU rules on State aid (C(2017) 8084). Curiously enough Sweden did not implement the article on reserved contracts in the directive of 2004. Sweden might have been the only member state who has refrained from implementing the previous article on reserved contracts. The reasons for not implementing the article was the need for further clarifications regarding the implication of concepts like “sheltered workshops” and “sheltered employment programmes” as well as a perceived risk of adverse market effects. These reasons have been revised this time.
Open questions	There is some discussion whether the people who work in sheltered workshops or economic operators whose main aim is social and professional integration must actually be employed or if it is enough that they are engaged by these organizations without having a regular employment. There is also some uncertainty regarding what categories of people are included in the concept “disadvantaged persons”. The same goes for the interpretation of the concept “sheltered employment programmes”. This might be a labour market programme that exists in other Member States but that has no direct equivalence in Sweden. These uncertainties all stem from the lack of exact definitions in the directive. There is not much written about the interpretation of this provision. There is some information in the preparatory works of the government and some guidance given by the National Agency for Public Procurement.		
Example of application from the national level (where applicable)	The provision is not an exclusion from the obligation to conduct a tendering according to the Act on Public Procurement. In other words the contracting authority is not allowed to award a contract directly to a supplier with reference to this provision.		

Article 40 of the Directive			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
There is no provision in the Swedish Act on Public Procurement corresponding to Article 40 in the directive. The reason for this is that such a provision is unnecessary or may even have an inhibitory effect. In the government bill this decision is explained in the following way: *"The Government agrees with the opinion expressed by the commentary comments on the rules, i.e., that it is desirable for contracting authorities and entities to conduct preparatory market research when appropriate. But it is not necessary to clarify in the law that it is allowed. It can not be ruled out that there is a risk that legal rules on this would in practice have an inhibitory effect. As the Swedish Competition Authority (Konkurrensverket) points out, it may be informed of the possibility of conducting preparatory market consultations in other ways, such as through the National Agency for Public Procurement (Upphandlingsmyndigheten). The Government therefore takes the view that provisions on market research should not be included in the laws."* (proposition 2015/16:195, s. 440).	Contracting authorities are not allowed to engage in pre-negotiation nor to give information which could have the effect of distorting competition or violating the principles of non-discrimination, equal treatment and transparency. For example, defining selection criteria or award criteria, or referring in the technical specifications to an element linked to one supplier.	Contracting authorities are allowed to seek or accept advice from independent experts or authorities or from market participants. This possibility exists irrespective of a specific provision on preliminary market consultations.	
Open questions	There are no serious elements of legal uncertainty regarding the possibility to conduct preliminary market consultations		
Example of application from the national level (where applicable)			

Article 42(1) of the Directive ► Act (2016:1145) on Public Procurement, Chapter 9, Sections 1 - 8			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
The technical characteristics that the product, service or works shall be listed as technical specifications. The specifications must be included in any of the procurement documents. They must be designed in one of the ways specified in 3-5 sections, provided that they do not violate mandatory technical rules. *The characteristics specified may also apply* *1. the process or method of producing or providing the goods, the service or the works, or* *2. a process that relates to another stage in the life cycle of the product, service or construction.* *The second paragraph also applies when the characteristics referred to are not the characteristics of the product, service, works or construction in question. However, the characteristics must be linked to what is to be acquired.* *The technical specifications may also indicate whether the transfer of intellectual property rights will be required.* (Act (2016:1145) on Public Procurement, Chapter 9, Section 1) *When the object that is to be acquired will be used by physical persons, the technical specifications shall be determined with respect to the needs of all users, including accessibility for persons with disabilities.* *Exceptions may be made only if there are special reasons.* *If the European Union has adopted mandatory requirements for accessibility in a legal act, the technical specifications referred to in the first subparagraph shall be determined by reference to that act.* (Ch. 9, Sec. 2) *A contracting authority may specify the technical specifications as performance or functional requirements. Performance or functional requirements may include environmental characteristics. The requirements must be designed to clearly state what is to be acquired.* *A contracting authority may allow a supplier to invoke the standards and assessments referred to in section 4 to demonstrate compliance with the requirements of the first paragraph.* (Ch. 9, Sec. 3) *If the technical specifications are not listed as performance or functional requirements, they shall refer to standards and assessments, and in*	These provisions do not prevent the contracting authority from pursuing social and environmental goals. According to Swedish case law a contracting authority is to a great extent free to determine what to acquire. The Supreme Administrative Court of Sweden concluded this in a case where it was disputed whether the authority was allowed to require that sutures were free from the chemical substance triclosan. In the judgement it is stated the following: *"When a contracting authority determines the object of a procurement, it has great freedom. For example, the authority may take environmental considerations by setting the requirements for the environmental characteristics of the product in the specifications. The requirements must be linked to what is to be procured, i.e. They will relate to and affect the requested product. A requirement that the product for environmental reasons may not contain a particular substance has such a connection".* (HFD 2010 ref. 78)	The provisions in the Swedish Act on Public Procurement relating to art. 42 of the directive closely follow the text in the directive. Only Sec. 6 and Sec. 12-15 (label) in Chapter 9 apply to procurements of social services and procurements below the thresholds. These procurements follow the rules in Chapter 19 of the Swedish Act on Public Procurement. Most Social Economy Enterprises are active in the welfare sector and consequently only bid for public procurements that are regulated by the provisions in Chapter 19. The provisions aim to frame the technical specifications to be set out in the procurement documents. A general principle establishes that technical specifications must be linked to the subject-matter of the contract and proportionate to its value and its objective. Aside from the general prescriptions, more specific subparagraphs relate to the requirement of technical specifications taking into account accessibility criteria for persons with disabilities and design for all users. When mandatory accessibility requirements have been adopted by a legal act of the European Union, such technical	The Discrimination Act is prohibiting discrimination in the form of lack of accessibility. This Act is in conjunction with other more detailed rules, in other constitutions, for instance in the Planning and Building Act.

descending order of priority to *1. Swedish Standard which complies with European Standard,* *2. European technical assessment,* *3. Common technical specification,* *4. International Standard,* *5. Other technical reference system developed by European standardization bodies, or* *6. Other Swedish Standard, Swedish Technical Approval, or, in the case of a Works or Use of a Product, Swedish Technical Specification for Design, Calculation and Execution.* *Any reference referred to in the first subparagraph shall be followed by the words "or equivalent".* (Ch. 9, Sec. 4) *A contracting authority may specify the technical specifications as performance or functional requirements in section 3 regarding certain characteristics and with reference to the standards and assessments referred to in section 4 in respect of other characteristics.* (Ch. 9, Sec. 5) *If this leads to the benefit or disadvantage of some suppliers, the technical specifications may not contain references to* *1. A product, origin or method of production which characterises goods or services provided by a particular supplier,* *2. Trademark, patent or type,* *3. Origin, or* *4. Manufacturing.* *However, such references may be made if it is justified due to what is acquired or otherwise it is not possible to describe what is to be acquired sufficiently clearly. Such reference shall be followed by the words "or equivalent".* (Ch. 9, Sec 6) *A contracting authority which, in accordance with section 3, specifies the technical specifications as performance or functional requirements may not reject a tender relating to a supply, service or works that corresponds to the standards or assessments specified in section 4, first paragraph, 1-5 or equivalent standards or assessments.* *The first paragraph applies only if* *1. The claimed standard or assessment refers to the performance or functional requirements specified by the Authority, and*		specification must refer to them. The provision in Sec. 3 contains novelty in terms of the obligation to take disability-friendly technical specifications into account by the contracting authority except in duly justified cases, when it was previously a simple goal to be reached.	

2. The tenderer shows that the goods, service or works meet the specified requirements. (Ch. 9, Sec. 7) *If a contracting authority makes claims by referring to a standard or assessment pursuant to section 4, it may not reject a tender solely because a supply, service or works does not comply with this standard or assessment if the tender shows that the proposed solutions meets the requirements in an equivalent manner.* (Ch. 9, Sec. 8)			

Open questions	It is unclear to what extent requirements regarding labour conditions in the process of production can be a part of the technical specification.
Example of application from the national level (where applicable)	A contracting authority may not use specifications that are not linked to the subject-matter of the supplies, services or works acquired or specifications that are clearly not compatible with the principles. It is not allowed to use requirements that are actually aimed at the supplier, i.e. the organisation and the capacity of the supplier, in the technical specifications. Authorities may not preclude technical specifications taking into account accessibility criteria for persons with disabilities or design for all users, except in duly justified cases.

Article 43 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 9, Sections 12-15			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Label refers to all documents, certificates or certification confirming that goods, services, works or processes or relevant procedures meet certain requirements. (Act (2016:1145) on Public Procurement, Chapter 9, Section 12) *A contracting authority may require in the technical specifications, award criteria or conditions of performance of the contract a certain label as proof that the supplies, services or works correspond to the characteristics required if* *1. The label requirements concern only criteria linked to the subject-matter to what is acquired,* *2. The requirements for the label are appropriate for defining the characteristics of the goods, service or works to be acquired,* *3. The label requirement is based on objectively verifiable and non-discriminatory criteria,* *4. The label has been adopted through an open and transparent procedure in which all concerned can participate,* *5. The label is available to all concerned, and* *6. The label requirements are determined by a body over which the applicant for the label does not have a decisive influence.* *If a contracting authority does not require that what is to be acquired has all the characteristics required by a label, it shall specify which requirements for the label to be met.* *If a label satisfies the conditions of the first subparagraph point 3 to 6, but the labeling requirements also concern criteria not related to what is to be acquired, the contracting authority may not require the label of the supplies, services or works. However, the authority may determine the technical specifications by referring to such detailed specifications of the marking related to what is to be acquired.* (Ch. 9, Sec. 13)	The provisions allow any label that meets the requirements in Sec. 13, not only eco-labeling. The contracting authority is allowed to require labeling in the technical specifications, the award criteria or the contract performance conditions.	These provisions facilitate for contracting authorities to acquire sustainable supplies, services and works. They facilitate the setting of requirements in the tendering, the assessment of the tenders and the monitoring during the duration of the contract. The contracting authority only has to check that the goods received have the label on the packaging. The agency that certifies the products assures that the products meet the requirements of the label. One could say that the labeling organization assumes an important part of the monitoring that otherwise would have to be carried out by the contracting authority. These provisions will also facilitate the monitoring of environmental goals as it makes it easier to measure the amount of branded goods and services purchased. In the past, contracting authorities were not allowed to require labels. Contracting authorities were allowed to require compliance with the environmental requirements behind a label, but not require the label as such. There are certain restrictions meant to protect suppliers from disproportionate consequences. As an example not every label is acceptable due to reasons that are aimed for the protection of the suppliers from labels that include irrelevant requirements, such as requirements that are not linked to the objects acquired.	There are general labeling rules regarding food information as well as specific labeling rules for groups of foods, such as dietary supplements, cocoa and chocolate products, fruit juices and fruit nectar, natural mineral water and spring water, veal and products containing caffeine or which are especially targeted at hypersensitive consumers. Origin marking is mandatory for beef, fish and some other products such as fruit, honey and olive oil. Since April 1st 2015, meat from pigs, lambs, goats and birds must also be labeled with origin. There is, however, no specific legislation regulating eco-labeling.

A contracting authority requiring a certain label under section 13 shall accept another label if the requirements of that label are equivalent to the requirements of the indicated label. (Ch. 9, Sec 14) *If a supplier has not had the opportunity within the given time-limit to obtain the label required by the contracting authority or an equivalent label, for reasons that are not due to the supplier, the contracting authority shall accept any other appropriate means of proof. These means of proof shall demonstrate that the supplies, services or works meet the requirements of the indicated label or, in the cases specified in Section 13, second paragraph, the specific requirements for the label.* (Ch. 9, Sec 15)		Furthermore, the supplier shall have enough time to access the label. This is, of course, of special interest for foreign suppliers if the contracting authority require a label that is only known in Sweden or the Nordic countries.	

Open questions	There are plenty of legal uncertainties regarding these provisions that all stem from the directive. Unfortunately, these legal uncertainties to some extent reduce the usefulness of this possibility to require labels. To begin with it is unclear how to interpret the prerequisites in Sec. 13. Especially the prerequisite that the requirements the label carries must be appropriate to define the characteristics of the supplies, services or works to be acquired is unclear. When is a requirement not appropriate to define the characteristics of the supplies, services or works? Do the criteria of fair trade not fulfill this prerequisite? There is a concern that the assessment of the Court in C-368/10, pp. 73-74, regarding fair trade is applicable also here so that the faire trade label is not an acceptable label since the criteria for fair trade are not considered to be appropriate to define the characteristics of the supplies. There is also a concern that the requirement that the production shall be compatible with core ILO conventions such as convention no 98 (the right of organizing and the right of collective bargaining) is not appropriate to define the characteristics of the supplies, services or works to be acquired. It is unclear to what extent labour conditions are part of the production process. It is unclear when another label can be considered to be equivalent to the label required, see Sec. 14. It is unclear when a supplier can invoke that the supplier *"has not had the opportunity within the given time-limit to obtain the label required by the contracting authority or an equivalent label, for reasons that are not due to the supplier".* Finally, it is unclear what is exactly "*any other appropriate means of proof*". Is the contracting authority entitled to deem extensive documentation that takes several hours to go through as inappropriate?
Example of application from the national level (where applicable)	The provisions on labels do not need to be included in the requirements on the supplier. It cannot be a justification for the exclusion of a tenderer because of lack of capacity. The label may not include requirements that are not linked to the subject-matter of what is acquired. As an example the label may not include requirements that refer to the supplier.

Article 46 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 4, Sections 13 - 16			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority may decide that a contract shall be awarded in separate lots. The authority may then also determine the size and object of these parts. (Act (2016:1145) on Public Procurement, Chapter 4, Section 13) *If a contracting authority decides not to award a contract in separate lots, the reasons for this shall be stated. The reasons shall be given in any of the procurement documents or in such an individual report as referred to in Chapter 12. Section 15.* (Ch. 4, Sec. 14) *A contracting authority which, pursuant to Section 13, decides that a contract shall be awarded in lots shall determine whether suppliers may tender for one or more of the lots of the contract.* *If tenders may be submitted to several or all lots of a contract pursuant to the first paragraph, the Authority may limit the number of lots of the contract that the Authority may award to one and the same supplier. When the Authority decides on such a restriction, it shall also determine the order to be applied when one and the same supplier in the application of the award criteria is to be awarded more lots of the contract than the restriction allows.* (Ch. 4, Sec. 15) *A contracting authority that divides a contract into lots pursuant to section 13 and determines that tenders may be submitted on several or all lots of the contract pursuant to section 15, may decide that several or all of the parts may be assigned to one and the same supplier as combined parts.* *If the Authority has decided that a split contract may be awarded in combined parts according to the first paragraph, it may award several or all of the parts of the contract to the supplier whose tender overall meets the award criteria. Such a grant is not subject to any restrictions under section 15, second paragraph.* *When the Authority decides that a split contract may be awarded in combined parts according to the first paragraph, it shall also determine the scheme to be used to assess which supplier (s) to be awarded the contract and whether the contract is to be awarded in parts or combined parts.*	The provision allows the contracting authority to divide the cake between more than one supplier in order to prevent the emergence of monopolies. This is especially important on local markets. This is, of course, also relevant when it comes to the social economy where there is one big actor, the state owned company Samhall AB. The provisions may be used in combination with the possibility to reserve contracts in order to prevent Samhall AB from taking the whole cake in a reserved contract procedure.	The provisions in the Swedish Act closely follow the content of the Article. The purpose of the provisions is consequently the same as those of the Article. The provisions shall encourage contracting authorities to award contracts where feasible, in the form of separate lots, in order to facilitate the participation in public procurement of civil society organisations (CSOs), social economy enterprises (SCEs) and small and medium sized enterprises (SMEs). If authorities decide not to organise the contracts into lots, they must provide the reasons for its decision. If authorities decide to divide the contract into lots, the provisions provide for two rules: 1. Contracting authorities shall indicate the maximum number of lots tenderers may submit for. 2. Contracting authorities may limit the number of lots that may be awarded to one tenderer. The provisions authorise contracting authorities to award contracts combining several or all lots. Contracting authorities should conduct such a comparative assessment by first determining which tenders best fulfil the award criteria laid down for each individual lot and then comparing it with the tenders submitted by a particular tenderer for a specific combination of lots, taken as a whole.	There is some connection with the Swedish Competition Act. The aim of these provisions is also to prevent concentration of large parts of a market into the hands of one economic actor.

(Ch. 4, Sec. 16)			
Open questions	The legal uncertainties regarding the Swedish provisions are basically the same as those concerning Article 46. It is a rather complicated challenge to determine how the lots will be divided before you know which and how many tenders there will be. I know of no example where the possibility to limit the amount of lots awarded to one tender has been used. This may be a result of the legal uncertainties but also because it takes time for the contracting authorities to adjust to the new possibilities offered in the new rules on public procurement.		
Example of application from the national level (where applicable)	It is not allowed for a contracting authority to decide not to divide a contract into lots without providing the reasons for its decision.		

Article 56 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 4, Sections 9-10, 12 and Chapter 16, Section 9			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority may authorize or request a supplier to correct a misprint, a miscalculation or other error in a document given by the tenderer. The Authority may also allow or request a supplier to clarify or supplement such a document. A measure referred to in the first subparagraph shall be consistent with the principles of equal treatment and transparency. (Ch. 4, Sec. 9) A contracting authority shall award contracts in accordance with the provisions of Chapter 16, The Authority shall check before it awards a contract 1. That the tender meets the requirements, terms and criteria stated in the procurement documents, 2. If the supplier is to be excluded under Chapter 13, and 3. that the supplier complies with the criteria that the Authority has stated that it will apply in accordance with Section 6 [selection of candidates that are invited to submit tenders, my remark] and the requirements set by the Authority pursuant to Chapter 14; 1-5 §§ [selection criteria, my remark]. (Ch. 4, Sec. 10) When the authority uses an open procedure the authority may evaluate the tenders before verifying the supplier pursuant to Section 10, second paragraph 2 [exclusion grounds, my remark] and 3 [selection criteria, my remark]. (Ch. 4, Sec. 12) If a supplier's tender does not comply with applicable environmental, social or labour law obligations, the authority may decide that the supplier shall not be awarded the contract. (Ch. 16, Sec. 9)	The provision in Ch. 4, Sec. 12 allows the contracting authorities, in open procedures, to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with Chapter 13-15. This means that contracting authorities can choose to invert the “normal” order of verification.	The Swedish provisions closely follow the content of Article 56. They include an obligation for the contracting authority to check the compliance of the tenderer with all requirements and selection criteria – an obligation that is more closely defined in Chapters 13 – 15. The compliance checks also include the tender, whether it complies with applicable rules in the fields of social and labour law and also environmental law. The provision in Ch. 4, Sec 9 that is supposed to correspond to Article 56(3) does not provide the authority with a useful opportunity to rectify an inadequate tender since this, in the overwhelming majority of cases, is considered to be incompatible with the principle of equal treatment. There is no provision corresponding to Article 56(4).	The provision in Ch. 16, Sec. 9 interacts with Swedish social and labour law as well as Swedish environmental law. The core conventions of ILO can also be mentioned in this context.

Open questions	Ch. 4, Sec. 9 also applies to procurements of social services and under the thresholds. The result is an extremely formal procedure where the best tender might be rejected due to simple formal defects. Social enterprises are not used to such a strict procedure. The same goes for small and medium-sized enterprises. In a recently published state-committee report on the possibilities to facilitate the rules on public procurement under the thresholds – “Möjligt, tillåtet och tillgängligt – förslag till enklare och flexiblare upphandlingsregler och vissa regler om överprövningsmål “ (eng. Possible, Allowed and Available - proposals for simpler and more flexible procurement rules and certain rules on review procedures), SOU 2018:44 – there are proposals that aim to make corrections of tenders more permissive. This should be possible, especially if there are no objective criteria indicating a certain cross border interest.
Example of application from the	Ch. 4, Sec. 9 does not allow the contracting authority to authorize or request a supplier to correct its tender if the deficiency in the

national level (where applicable)	tender relates to the fulfilment of a mandatory requirement. This goes for almost any shortcoming in the tender. There is often a mandatory requirement that the tender shall include all the information requested in the procurement documents. If some information is missing, then – this is a lack of fulfilment of a mandatory requirement that cannot be rectified according to case law due to the wording of this provision. Quite often the best tender must be rejected if the tender does not meet all the mandatory requirements, although this lack of compliance is due to a sheer blunder from the supplier. Ch. 4, Sec. 12 does not allow contracting authorities to invert the "normal" order of verification of criteria, meaning examining award criteria before selection criteria, in other procedures than the open procedure.

Article 57 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 13, Sections 1 - 7			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority shall exclude a supplier from participating in a procurement, if the authority through control under Chapter 15 [the Chapter on self declaration and assessment of suppliers relating to Articles 59, 60 and 61]*, or otherwise becomes aware that the supplier in accordance with a final judgement has been convicted of crimes that include* *(…)* *6. trafficking in human beings as defined in Article 2 of Directive 2011/36 / EU of the European Parliament and of the Council of 5 April 2011 on the prevention and control of trafficking in human beings, the protection of its victims and the replacement of Council Framework Decision 2002/629/JHA in the original wording.* *If the supplier is a legal person, the supplier shall be excluded if a person who is part of the supplier's administrative, management or supervisory body has been convicted of the crime. The same applies if the person convicted of the crime is authorized to represent, make a decision or supervise the supplier.* (Ch. 13, Sec. 1) *A contracting authority shall exclude a supplier from participating in a procurement, if the authority through control under Chapter 15, or otherwise becomes aware that the supplier has not fulfilled its obligations regarding payment of taxes or social security contributions in country of its establishment or in the country where the procurement takes place, and this has been determined by a binding court decision or authority decision that has been given effect.* *A contracting authority may exclude a supplier from participating in procurement if the authority can demonstrate by another appropriate means that the obligations referred to in the first subparagraph have not*	The provisions oblige or allow contracting authorities to exclude an economic operator from the procurement depending if they base the procedure on mandatory and discretionary grounds of exclusions.	Chapter 13 of the Act on Public Procurement specifies the grounds on exclusion, both the mandatory ground and the discretionary grounds. There is no equivalence in the Swedish Act to Article 57(6) last subparagraph: *An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.* Furthermore, there is no provision in the Swedish Act corresponding to Article 57(7) on the maximum period of exclusion. The government justifies this that such provisions are not required (?) and that the time a supplier may be excluded will be determined by the application of the principle of proportionality. (see proposition (Eng. Government bill) 2015/16:195, p. 741) By the same token there is no provision in the Swedish Act corresponding to Article 57(3) second subparagraph on exception from exclusion in case of minor amounts etc. (see proposition (Eng. Government bill) 2015/16:195, p. 744-745)	There is no provision in the Swedish penal code that criminalizes membership in a criminal organization or a terrorist organization per se. Apart from this there are provisions in the Swedish penal code that correspond to the mandatory grounds of exclusion in Ch. 13, Sec. 1.

been fulfilled. (Ch. 13, Sec. 2) *A contracting authority may exclude a supplier from participating in a procurement, if* *1. The authority can demonstrate that the supplier has breached applicable environmental, social or labour law obligations,* (…) *3. The authority can demonstrate that the supplier has committed a serious breach of professional practice which may call into question the integrity of the supplier,* (…) *5. The supplier has shown serious or persistent shortcomings in the fulfilment of any essential requirement in a prior contract under this Act, the Act (2016: 1146) on procurement in the utilities sector, the Act (2016: 1147) on the procurement of concessions or the Act (2011: 1029) on defence and security procurement, and this has led to the early termination of the prior contract or damages or comparable sanctions,* (Ch. 13, Sec. 3) *A contracting authority shall, before exclusion of a supplier, give the supplier the opportunity to give its opinion within a specified period, on the grounds which, according to the authority, constitute grounds for exclusion.* *A supplier subject to any exclusion under section 1 or 3 shall not be excluded if the supplier provides evidence that it is reliable because it has;* *1. replaced or undertaken to compensate for any damage caused by the crime or maladministration,* *2. clarified circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and* *3. taken concrete technical, organizational and personnel measures aimed at preventing criminal offences or misconduct.* *The measures taken by the supplier shall be evaluated taking into account the gravity of the crime or the misunderstanding and the particular circumstances*		Apart from these deviations the Swedish Act closely follows the text in the Article. The provisions in Ch. 13, Sec. 1 – 3 also apply to social and other special services and procurement under the thresholds.	

surrounding these. *A supplier who has fulfilled its obligations regarding payment of taxes and social security contributions, including interest and penalty payments, or entered into a binding agreement on payment or equivalent shall not be excluded in accordance with Section 2.* *A supplier who has fulfilled its obligations regarding payment of taxes and social security contributions, including interest and fines, or entered into a binding agreement on payment or equivalent shall not be excluded in accordance with Section 2.* (Ch. 13, Sec. 5) *A contracting authority may refrain from the obligation to exclude a supplier if warranted by overriding public interest considerations.* (Ch. 13, Sec. 6) *A contracting authority may, at any time during the procedure, exclude a supplier, if there appears to be grounds for exclusion.* *A contracting authority shall promptly inform a supplier in writing of the decision and the reasons for it.*			

Open questions	There is uncertainty regarding which persons belong to the administrative, management or supervisory body of a supplier. According to the Government bill a solicitor or an external auditor probably does not belong to the supervisory body but the Government recognises that this must be clarified in case-law. The remark that if the supplier is a legal person, the supplier shall be excluded if a person who is part of the supplier's administrative, management or supervisory body has been convicted of the crime only applies to the mandatory grounds. It is unclear if the same goes for the discretionary grounds.
Example of application from the national level (where applicable)	The provision in Ch. 13, Sec. 1, just like the Article, does not allow contracting authorities to choose an economic operator that enters into a mandatory ground of exclusion except in case of derogations permitted by the Directive and established by the Member States. A contracting authority that has chosen to use also the discretionary grounds is not allowed to accept a tender from a tenderer who should be excluded according to one of these grounds. This follows on from the principle of equal treatment.

Article 67 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 16, Sections 1-3 and 6			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority shall award a contract to the supplier whose tender is the most economically advantageous to the authority. *Which tender is the most economically advantageous tender should be evaluated on the basis of one of the following grounds:* *1. best price-quality ratio,* *2. cost, or* *3. price* *In any of the procurement documents, the authority shall state the ground for evaluation of tenders it intends to use.* (Ch. 16, Sec. 1) *When a contracting authority evaluates a tender on the basis of the best price-quality ratio, it shall assess the tender based on criteria linked to what is to be acquired.* *An award criterion shall be deemed to be linked to the supplies, services or works to be acquired if the criterion in any respect relates to the supply or service or to the work at any stage of the life cycle.* *The award criteria shall ensure effective competition and shall not confer an unlimited freedom of choice to the contracting authority. They will be presented so, based on the information given by the supplier, it is possible to check to what extent the tender meets the criteria. If there is good reason, the authority shall check that the supplier's information is correct.* (Ch. 16, Sec 2) *When a contracting authority evaluates a tender based on cost, the authority shall evaluate the impact of the tender on cost-effectiveness, such as an analysis of the cost of the supply, service or construction work life cycle.*	It is allowed to have a fixed price so that suppliers will compete on quality criteria only, although this is not explicitly stated in the provisions. The provision allows contracting authorities to use social award criteria such as creating jobs for unemployed, fair trade or compliance with core conventions of the ILO.	The text in the Swedish Act follows the content in the Article. However, there are parts in the Article that have not been included in the Swedish Act, for example the paragraph concluding that the cost element can be a fixed price or cost so the suppliers will compete on quality criteria. The provisions provide for three award criteria: price or cost, cost-effectiveness approach and the Best Price-Quality Ratio - BPQR (called "most economically advantageous tender, and "MEAT" in the previous Act). With the latter, a certain "weighting" is given to the different combinations of criteria chosen. If the "Best Price-Quality Ratio - BPQR" is used, social considerations can be included among the different award criteria to be weighed, together with the price or cost and other criteria such as social, quality and environmental considerations. Those other criteria must be linked to the subject matter of the public contract in question. Contracting authorities are free to define the subject of the contract in any way that meets their needs, as long as they do not distort the level playing field for enterprises throughout the EU, i.e. draw up a contract that unfairly favours a provider. The fact that contracting authorities may now take into consideration the specific production process in the context of the award criteria allows them to lay down social-related award criteria that cannot be used in the technical specifications. For instance, fair trade can be an award criterion	I cannot think of interactions with any other national law of relevance.

(Ch. 16, Sec. 3) *When the basis for the evaluation of tenders is the best price-quality ratio, the award criteria must be weighted together. They may be weighted in intervals with an appropriate maximum allowable spread.* *If it is not possible to weight the criteria, the authority shall consider them by using a priority order.* *In any of the procurement documents, the authority shall specify the criteria to be weighted or the priority order to be applied.* (Ch. 16, Sec. 6)		but not a part of the technical specification. The social considerations can include factors such as job creation, decent work, democratic ownership, social and professional inclusion of persons with disabilities and disadvantaged persons, integration of disadvantaged groups in the democratic process of the enterprise and accessibility of the service (particularly for those living in remote areas).	

Open questions	There are many legal uncertainties related to the provisions on award criteria. These uncertainties are mainly of a general nature, not specific to social economy enterprises. One challenge is to formulate an award criterion in a way that allows all reasonably well-informed tenderers exercising ordinary care to understand the exact scope thereof and thus to interpret them in the same way (C-368/10, p. 88). There is plenty of Swedish case law scrutinizing the clarity of award criteria as well as the clarity of the model of evaluation. There is also an ongoing debate as to what extent references may be used as award criteria. Many award criteria, not the least references, are deemed not compatible with the provisions on award criteria since they are considered to evaluate the capacity of the tenderer, rather than identifying the most economically advantageous tender. This depends, however, on how the award criteria are formulated. There is no rule in the Swedish Act that forces suppliers to object to procurement within a certain time-limit. Thus it is possible for a supplier to wait with objections until the announcement of who is awarded the contract although these objections could have been made much earlier since they relate to deficits in the procurement documents. The judgment of the Court in *eViglo* indicates that a supplier is obliged to request clarifications at an earlier stage if possible (C-538/13, p. 56). However, this remark of the Court has not had any influence on Swedish case law until now.
Example of application from the national level (where applicable)	The provisions do not allow contracting authorities to use social award criteria that are not linked to the subject matter of the public contract (as criteria and conditions relating to general corporate policy or requirement to have a certain corporate social responsibility policy in place). Thus contracting authority cannot use award criteria that have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition.

Article 69 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 16, Sections 7-8			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
If a tender appears to be abnormally low, the contracting authority shall request that the supplier explains the low price or cost. Such a request for explanation may apply *1. If the supplier is able to make use of particularly cost-effective methods for completing the contract,* *2. If the supplier can avail of technical solutions or unusually favourable conditions for fulfilling the contract,* 3. *the nature of the goods, services or works proposed by the supplier,* *4. how the supplier intends to complete the contract in respect of applicable environmental, social or labour law obligations,* *5. If the supplier can receive state aid, or* 6. *the obligations referred to in Chapter 17; 6 or 7* [information about subcontractors, my remark]. *The authority shall reject the tender if the supplier has not satisfactorily explained the low price or the cost.* *A contracting authority shall also reject a supplier's tender if it finds that the abnormally low price is due to the fact that the tender is not in accordance with applicable environmental, social or labour law obligations.* (Ch. 16, Sec. 7) *If a contracting authority finds that a tender is abnormally low due to the fact that the supplier has received state aid, the authority shall provide the supplier with an opportunity to demonstrate within a reasonable period that the aid is compatible with the Treaty on the Functioning of the European Union (TFEU).* *If, after such a measure referred to in the first subparagraph, the supplier has not shown that the aid in question is compatible with the TFEU, the tender shall be rejected.* *A contracting authority rejecting a tender pursuant to the second subparagraph shall notify the European Commission thereof.* (Ch. 16, Sec. 8 §)	The provisions allow, but also oblige, contracting authorities to reject abnormally low tenders where the tenderer is unable to give a sufficient explanation. This obligation to reject abnormally low tenders where the tenderer is unable to give a sufficient explanation is valid also where it has been established that the abnormally low price or costs proposed result from non-compliance with (international or national) social or labour law provisions.	The provisions shall ensure that the tender is serious, despite an abnormally low price. It can be used as a tool to ensure compliance with labour and social laws in the procurement process. However, lack of compliance with labour and social laws is only one possible explanation to abnormally low tenders. Another reason could be that the supplier does not intend to deliver the items where the supplier has offered an abnormally low price or that the supplier has misinterpreted the requirements in the procurement documents. Where tenders appear to be abnormally low, contracting authorities shall require economic operators to give explanations. These explanations may notably refer to compliance with obligations ensuring compliance with social and labour law provisions. A satisfactory answer could be that the supplier is bound by a collective agreement and consequently obliged to pay decent salaries to its workers. Of course, the contracting authority may also have to also check if there is an intention to use subcontractors and if these subcontractors will abide by labour and social laws.	Conditions of employment are indeed regulated in Swedish law such as the Employment Protection Act (lagen om anställningsskydd), Co-Determination Act (medbestämmandelagen), the Leave Act (semesterlagen) and the Working hours' code (arbetstidslagen). However, the level of the working conditions is largely fixed in collective agreements that in many aspects take over the law. Swedish rules on state aid which are based on EU law. The law (1999:678) on posting of workers. Apart from other national laws there are also the core conventions of ILO.
Open questions	The Supreme Administrative Court has in recent years interpreted the provision on abnormally low price in a number of rulings. The latest one deals with the question if a contracting authority may decide in advance what is an unacceptable low price. In the procurement document it was stated that a price lower than 350 Swedish crowns per hour was considered unreasonably low and		

	therefore not acceptable. According to the Supreme Administrative Court the condition was in breach of the principle of equal treatment since it *"prevents the supplier from competing with the price because tenders below the floor price are automatically ruled out."* The condition also violated the provision on abnormally low price since it meant an automatic rejection without giving the tenderer the opportunity to give a satisfactory explanation to its abnormally low price (HFD 2018 ref. 50). One could say that most legal uncertainties related to these provisions have been sorted out by recent case law.
Example of application from the national level (where applicable)	Contracting authorities are not allowed to reject a tender that appears to be abnormally low without having allowed the tenderer to give explanations. They are neither allowed to award a contract to a tender without having verified the relevant explanations as to the low level of the price or costs. In any case, contracting authorities are not allowed to accept a tender where it has been established that the abnormally low price or costs proposed result from non-compliance with (international or national) social or labour law provisions.

Article 70 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 17, Section 1			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority may lay down specific environmental, social, labour and other conditions for the performance of a contract. *Special conditions for performance of contracts shall be linked to what is acquired within the meaning of Chapter 16, Section 2, second paragraph, and stated in the procurement documents.* (Ch. 17, Sec. 1)	Contracting authorities are allowed to set additional conditions for performance of contracts linked to their subject matter.	This provision is important for the enforcement of social and labour rights in the performance of contracts. It allows contracting authorities to set additional conditions for performance of contracts linked to their subject matter, such as employment related requirements. Contract performance clauses can contribute to achieving social policy objectives, as they allow contracting authorities to go beyond the standards set by binding legislation. Compliance with such clauses is verified at the execution stage, not during the tender's assessment. The tender has to accept the condition though.	Act (1999: 678) on posting of workers as well as Swedish labour law in general.
Open questions	The notion of "link to the subject matter" is not fully clear. It is also unclear if labels that include social requirements can be a condition for the performance of the contract, see matrix on Article 43.		
Example of application from the national level (where applicable)	Contracting authorities are not allowed to set performance conditions that are not linked to the subject-matter of the contract. Contract clauses may not relate to the general corporate policy of the supplier.		

Article 71 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 17, Sections 2, 4, 6-7			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority shall, if necessary, require the supplier to perform the contract in accordance with the minimum conditions of pay, vacation and working time that the employees who perform the work under the contract shall be ensured. *The authority shall also require the supplier to ensure that its subcontractors who directly contribute to fulfilling the contract meet the conditions set out in the first paragraph.* (Ch. 17, Sec. 2) *A contracting authority shall, if necessary, require the supplier to perform the contract under specified terms in accordance with the ILO Core Conventions, if the work is performed under such conditions that Swedish labour law is not applicable.* *The authority shall also require the supplier to ensure that its subcontractors who directly contribute to fulfilling the contract meet the conditions set out in the first paragraph.* (Ch. 17 Sec. 4) *A contracting authority may require a supplier to provide information about* *1. Whether and, if so, how much of the contract that the supplier intends to subcontract to someone other than the supplier, and* *2. Which subcontractors the supplier intends to hire to fulfill the contract in that part.* *In any of the procurement documents, the authority shall indicate the information that the supplier shall submit.* (Ch. 17, Sec. 6) *A contracting authority shall require that the supplier who has been awarded a contract relating to a construction contract or which relates to a service to be provided to a facility under the direct supervision of the authority, shall indicate the name and contact details of the subcontractors employed and the subcontractors' legal representatives. The information shall be provided before the supplier commences the performance of the contract.* *The authority shall also require the supplier to notify the authority of any change of name and contact details made during the course of the contract.* *The first and second paragraphs do not apply if the subcontractor is a supplier of goods.*	Contracting authorities are allowed to acquire information relating to subcontracting from the supplier.	Ch. 17, Sec. 2 and 4 impose on competent national authorities the obligation to ensure that subcontractors comply with the obligations referred to in Ch. 17, 2-5 §§. Ch. 17, Sec, 6 - 7 entail a possibility for the contracting authority to require information about subcontractors from the supplier. Article 71 (3) provides for a subcontractor to request that a contracting authority or entity pay for the performance of a contract directly to the subcontractor. The Swedish legislator has decided not to implement this possibility. The reasons for not doing this are that it is contrary to what is generally applicable, namely that a main supplier is responsible for the completion and therefore also receives the payment, it will lead to legal and delivery technical problems and it will complicate contract monitoring for contracting authorities and entities. (prop. 2015/16:195, p. 841) I cannot find any provision in the Swedish Act on Public Procurement that corresponds to art. 71(6)(a). The provision in Ch. 13, Sec. 8 corresponds to art. 63(1) third subparagraph (capacities of other entities) but there is no provision that corresponds to art, 71(6)(a). I cannot find any provision in the Swedish Act on Public Procurement that corresponds to art. 71(6)(b). In Ch. 13, Sec. 7 there is a provision that corresponds to art. 63(1) second subparagraph (capacities of other entities) but not one that corresponds to art. 71(6)(b).	NA

Open questions	NA
Example of application from the national level (where applicable)	Sections 2 and 4 do not allow that the requirements regarding labour conditions include subcontractors that do not directly contribute to fulfilling the contract. Such requirements are not considered to be sufficiently linked with the contract.

Articles 74 to 76 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 19			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Procurement of social services and other specific services are regulated in Chapter 19 of the Swedish Act on Public Procurement. This chapter entails provisions that are similar to those for regular services over the thresholds and also similar to the rules in the old Act on public procurement regarding part B-services. For example, the provision in Chapter 4, Sec. 1 on the principles applies unreservedly to the procurement of social services and other specific services. The same goes for the provisions on exclusion and the award of contract, including abnormally low tenders. The provision in Chapter 4, Sec. 9, that gives the contracting authority a very limited possibility to allow tenderers to rectify flaws in the tenders, also applies to procurement of social services and other specific services. There is no equivalent, however, to Chapter 14 and 15 (selection criteria, ESPD and means of proof). This facilitates for the contracting authority as well as the suppliers since the rules in the new directive regarding the control of tenderers are considered to be very strict and time consuming. The procedures in Chapter 19 are less strict in the sense that they do not have to be announced in TED, there are no fixed minimum time limits for the receipt of tenders with the exception of a minimum time limit of ten days for the request to participate in the procedure in Chapter 19 corresponding to the restricted procedure. The time limit shall be "reasonable" (Ch. 19, Sec. 15). Notably, the contracting authority is always entitled to negotiate with tenderers. Apart from a possibility for a court to decide that a contract that has been awarded in a way that violates the law may endure due to overriding reasons relating to the public interest there are no provisions that allow the contracting authority to take into account the specificities of the social services. There are no provisions that explicitly ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility and so forth of users. New rules will come into force the 1st of January 2019, regarding the procurement of social services under the	From the 1 of January it will be allowed to acquire social services under the threshold in a more flexible way, especially if there is no cross-border interest. From the 1 of January it will also be allowed to reserve contracts of certain services.	Since there are no provisions explicitly allowing the contracting authority to take into account the sensitivity of social services one could question whether Sweden has correctly implemented Article 76. The reason for not having special rules on the procurement of social services and other special services is mainly that it would create a more complicated and obscure regulatory system. In the committee report different regulatory options were discussed: *"It may be argued that the third option* [special rules for the procurement of social services and other specific services, my remark] *contributes to the desired flexibility. According to the committee, however, there are apparent gains for the applicant. It seems clear that the creation of additional regulatory systems under the new laws would be at the expense of the transparency of the laws, thus hampering the application. The positive effects that may be a consequence of flexibility do not consider the risks that come with a more complicated regulatory framework…* *Accordingly, the articles should therefore be implemented according to the first option* [i.e. basically the same rules as in the old Act on Public Procurement regarding part B-services and procurements under the thresholds]*. This means that social*	The Act on freedom of choice

threshold of 750 000 euros (see below) and the implementation of article 77. However, there will not be any special rules taking into account the sensitivity of the services to the person in tenderings over the thresholds. There is, however, a special law on freedom of choice for users (lag om valfrihetssystem) in the field of social services and health care. This means that the user can choose between a list of suppliers, including the local authority. Freedom of choice is considered to be a variety on public procurement. The law on freedom of choice consequently entails many provisions that are extracted from the Act on Public Procurement. As of the 1st of January the new rules mentioned above will come into force allowing the contracting authority to procure social services and other special services under the threshold 750 000 euro without having to adhere to the principles in Ch. 4, Sec 1. The procurement will need to be announced. If there is a certain cross-border interest the principles shall apply after all. Article 77 will also be implemented (see matrix on Ch. 19, Sec. 6 a – 6 b).		*services and other special services will be procured according to rules in the new Act on Public Procurement and the new Act on Procurement in the Utilities sector rules similar to those applying to part B services under current regulations."* (Nya regler om upphandling, SOU 2014:51, s. 326) The legislator accepted this position to begin with but has now decided that Sweden should take advantage of the opportunity to enact more flexible rules for the procurement of social services. According to the government this would be in favour of the users and also benefit organisations in the non-profit sector. The new rules on procurement of social services under the thresholds and the implementation of Article 77 were enacted by a unanimous parliament.	

Open questions	Cross-border interest? What if the public contract under the threshold actually turns out to have a certain cross-border interest? This assumption must be concretely verified. CJEU assumes that objective criteria to assess whether the contract is endowed with a certain cross-border interest are: - The value of the contract, in conjunction with the place where the work is to be carried out (Sweden is located in the outskirts of the union), - The technical nature of the contract and the specific characteristics of the goods concerned, - Real complaints made by operators in Member States other than that of the contracting authority, - The fact that, at the time of the award of the contract at issue in the main proceedings, similar services may previously have been provided by entities established in other Member States, - … (See, *e.g.* CJEU, *Oftalma Hospital*, 19 April 2018, C-65/17; *Commission v Italian Republic*, 29 November 2007, C-119/06). There is also a need for clarification when an agreement implies an acquisition and when the agreement merely implies financing, see Recital 4. In Sweden there is a form of agreement between local authorities and non-profit organisations that is called Idéburet Offentligt Partnerskap (eng. Nonprofit Public Partnership). At least some of these Nonprofit Public Partnership agreements should be considered financing rather than acquisition.

Example of application from the national level (where applicable)	The provisions do not allow award criteria other than those permitted in Ch. 16, Sec. 1 (Article 67). There are no provisions that allow more flexibility in regards to procurement of social services as such. This will still be the case when the new rules come into force the 1st of January 2019 for procurements over the threshold with the exception of the possibility to reserve contracts for certain services.

Article 77 of the Directive ► Act (2016:1145) on Public Procurement, Chapter 19, Section 6 a – 6 b			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
A contracting authority may reserve the participation in a procurement of services listed in Annex 2a and covered by CPV codes 79622000-0, 79624000-4, 79625000-1, 85000000-9 to 853230009, 98133000-4, 75121000-0, 75122000-7, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5 and 80590000-6, for such organisations which *1. have the purpose of fulfilling a public mission connected with the provision of such services,* *2. reinvest any profit to achieve the purpose of 1, and* *3. have a management and ownership structure based on the ownership or participation of the employees or which requires active participation of employees, users or stakeholders.* *The duration of a contract awarded under the first subparagraph shall not exceed three years.* *Where a contracting authority has, pursuant to the first subparagraph, awarded an organisation a contract for a particular service during the last three years, the authority may not assign to that organisation a contract for the service concerned pursuant to the same paragraph.* (Ch. 19, Sec. 6 a) *A contracting authority intending to reserve participation in a procurement pursuant to section 6 a shall state this in the contract for procurement.* (Ch. 19, Sec 6 b)	Contracting authorities are allowed to authorize national contracting authorities to reserve the right for some organisations to participate to public contracts covering services that are enumerated in Appendix 2 a to the Act on Public Procurement: - Administrative educational services; - Administrative healthcare services; - Administrative housing services; - Supply services of domestic help personnel; - Supply services of nursing personnel; - Supply services of medical personnel; - Pre-school education services; - Higher education services; - E-learning services; - Adult-education services at university level; - Staff training services; - Training facilities; - Tutorial services; - All types of medical services; - Library, archives, museums and other cultural services; - Sporting services; - Services furnished by social membership organisations; - Services provided by youth associations. Call for competition must make reference to this Article.	Ch. 19, Sec 6 b gives contracting authority the possibility to reserve the right to participate in public procurements for organisations under certain strict conditions enumerated in the provision. The possibility to provide for reserved contracts for certain services is to be distinguished from reserved contracts as under Ch. 4, Sec. 18. The possibility to provide for reserved contracts for certain services should also be distinguished from the exclusion of contracts of civil defense, civil protection etc., provided by non-profit organisations according to Ch. 3, Sec. 26 (Article 10h)	
Open questions	There are some elements of legal uncertainty. The provisions mention organisations based on employee ownership, active employee participation in their governance or organized in the legal form of a cooperative. Does this mean that other nonprofit organisations not based on employee ownership are not included? It is also unclear if these provisions based on article 77 is the only possibility for member states to provide that contracting authorities may reserve the right of organisations to participate in procedures for award of contracts in the health, social and cultural services (with the exception of civil defense etc.).		

	In the directive there is also a possibility to exclude contracts of civil defense etc. if the supplier is a non-profit organisation (Article 10 h). This article corresponds to the judgement of the Court in *Spezzino* (C-113/13). However, there is no Article in the directive that corresponds to *Sodemare* (C-70/95). Article 77 differs from *Sodemare* in many ways. In *Sodemare* there was no restriction regarding the duration of the contract, to give one example. Does Article 77 imply that *Sodemare* is no longer valid? The strict conditions enumerated in Article 77 could be perceived as an encroachment on the freedom of the Member States to retain its social security systems recognized in the Treaty (*Sodemare,* p. 32). The interpretation of Swedish lawyers is that the Directive regulates the possibilities to reserve contracts in the health, social and cultural services in an exhaustive manner. This is not, however, the interpretation of the Norwegian government, see https://www.regjeringen.no/no/dokumenter/forslag-til-ny-forskriftsbestemmelse-om-adgangen-til-a-reservere-anskaffelser-av-helse--og-sosialtjenester-for-ideelle-organisasjoner/id2609347/?expand=horingsnotater.
Example of application from the national level (where applicable)	These provisions cannot be used in order to award contracts to economic operators that have already been in charge of the same services within the past three years. Duration of the awarded contract may not exceed three years. These provisions do not allow for a contract to be directly awarded without a contract award notice.