

Summary

Today the Swedish Local Government Act (SFS 2017:725) contains rules regarding contractual municipal cooperation. These rules are only a few years old and are still relatively unclear. Contractual municipal cooperation in practice means that municipalities and regions can hand off tasks to one another. The purpose of these rules is to increase efficiency in the municipal sector; several municipalities can work together; larger municipalities can help smaller ones. Before the possibility of contractual municipal cooperation municipalities could cooperate through local federations and common committees. These forms remain available to municipalities today but have been criticised for being unwieldy and bureaucratic. Contractual municipal cooperation is the simplest form of municipal cooperation as it only requires a contract to be created. It does not require the building of an organisational superstructure.

Cooperation between municipalities may have legal implications as it relates to procurement law. In certain circumstances the cooperation may be required to be put out to tender whereas in others the cooperation may be exempted from these procurement rules. The two most important exceptions are the exercise of public authority and so-called Hamburg-cooperation.

This report aims to investigate, as far as it is possible, the legalities regarding the Swedish municipalities and regions' potential to cooperate by means of contracts according to the Local Government Act and the procurement laws. Here we may already note that the law on this subject is relatively unclear, primarily because the legal sources are few and not always clear-cut.

The report is intended to be relatively easily accessible and for it to be distributed throughout the municipalities and the regions so that it may benefit the work they do. The ambition is therefore that

the language should be clear, comprehensible, and relatively un-academic.

While the Local Government Act provides great opportunities for cooperation, the procurement regulation creates certain obstacles to it. This relationship was noted by the legislator as these rules were added to the Local Government Act. It is, however, not a trivial task to investigate and assess the procurement regulation's implications on contractual municipal cooperation.

The first exemption from the procurement regulation with regards to municipal cooperation is the exemption for tasks that involve the exercise of public authority. These areas include social services, regulatory inspections, urban planning, etc. These include numerous and sizable activities where primarily the municipalities are exercising public authority and where cooperation pursuant to the Local Government Act is generally allowed today. While it is possible to have objections to this interpretation, a preponderance of reasons point to the conclusion that exercises of public authority are exempted from the procurement regulations. This is evidenced clearly by our Instrument of Government and the directive which is the basis of the EU-wide procurement regulations.

The second exemption consists of the so-called Hamburg-exemption or the Cooperation-exemption. The European Court of Justice (ECJ) has in several rulings concluded that Contracting Authorities, states, municipalities, or regions may cooperate with one another if it concerns a public task that they all have to perform and provided that no private party unduly benefits from the cooperation. The latest ruling from the ECJ came during the summer of 2020 and provides that, simply put, it is sufficient that the cooperating parties are acting towards a common goal. There need not be true cooperation. Additionally, the ruling clarifies that so-called ancillary activities, e.g. administration of wages and personnel, IT, property management, etc., which are necessary in order to achieve the common task, also qualify as Hamburg-cooperation and can therefore be exempted from the procurement regulations.

While all the facets of the laws may not yet be crystal-clear, this should mean that the Swedish municipalities and regions are able to cooperate, through contracts according to the Local Government Act, without incurring the duty to put the contract out to tender.

The municipalities may cooperate if they fulfil the criteria for the Hamburg-exemption. The most important criterion is the common task. In the so-called Hamburg-ruling, from the ECJ, the case concerned several German municipalities that were cooperating regarding waste management and assisted each other in different ways to achieve the common task. It was a private corporation that raised their concern and ultimately got the matter tried by the ECJ as they believed that the object of the cooperation, the waste management, should have been put out to tender; that the municipalities ought to have asked the market, through the procurement process, if any private party could have assumed these tasks. The German courts elevated the matter to the ECJ. The court held that because the municipalities had a common task – waste management – and that no private party had benefitted from it, it was exempt from the procurement regulations and therefore did not have to be put out to tender. This exemption is now implemented in our Swedish procurement laws.

This means that Swedish municipalities and regions may cooperate in areas where there are common public tasks. Such tasks abound in the areas of special legislation. A municipality could seemingly be active in the ancillary activities while another active in fulfilling the actual common task. From case-law and the directive appears that voluntary tasks for municipalities and regions may also qualify as a Hamburg-exemption. Within the general competencies outlined in the second chapter of the Local Government Act it is thus possible to cooperate without tender obligations. This creates extensive opportunities for contractual municipal cooperation. The report contains a short exposition of the various areas where contractual municipal cooperation is possible without tendering. It should be noted that our administrative courts, most importantly the Swedish Supreme Administrative Court, has yet to rule on any matters concerning their interpretation of the Hamburg-exemption, contractual municipal cooperation, and the procurement regulations.