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Cartels in public procurement – potential adverse effects of competition law enforcement against tenderers

– A critical view of recent case law in Sweden

Photo: Visit Stockholm

Caveats in enforcement

- **Type 1 errors**
  - **Error credulitas; false positives, excessive credulity**
- **Type 2 errors**
  - **false negatives, excessive scepticism**

	Accept null hypothesis (H_0)	**Reject null hypothesis (H_0)**
Null hypothesis (H_0) is true	Correct! True negative	Type 1 error False positive
The alternative hypothesis (H_1) is true	Type 2 error False negative	Correct! Ture positive

What else can go wrong?

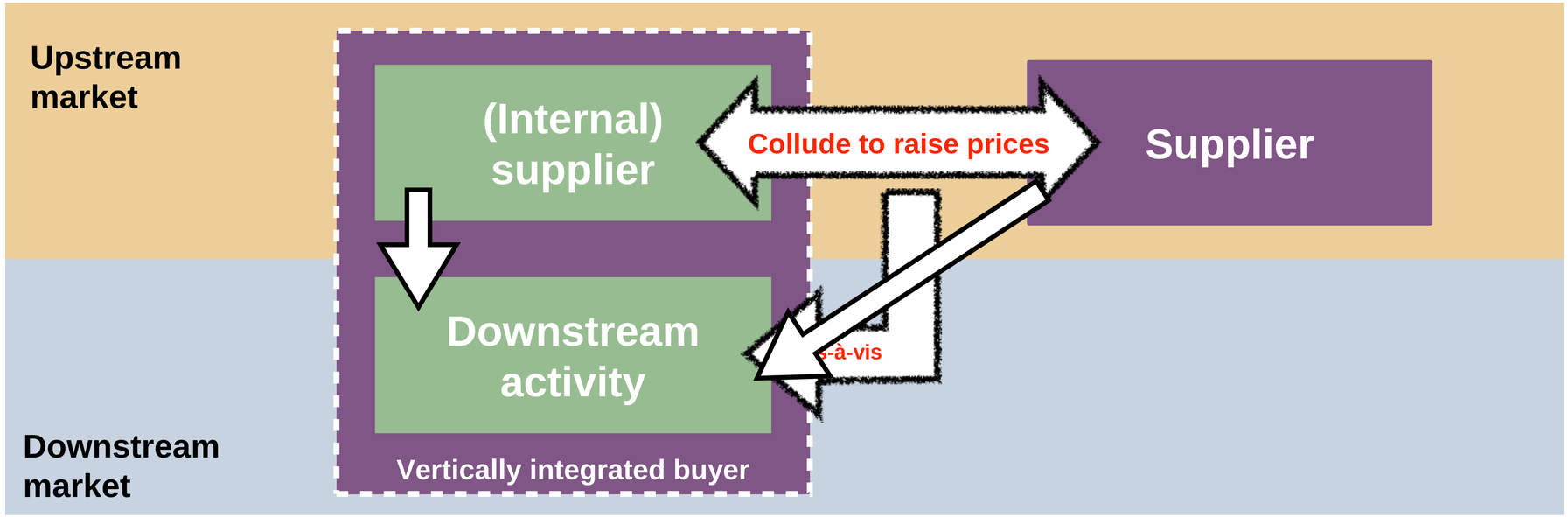
- **Type 3 errors - getting it utterly wrong…**
  - **System theory: Asking wrong questions and using wrong null hypothesis**
    - **Correctly rejecting the null hypothesis for wrong reasons**
    - **”…the error committed by giving the right answer to the wrong problem" (Kimball, 1957)**
    - **”It is better to solve the right problem the wrong way than to solve the wrong problem the right way” (Hamming)**
- **Type 4 errors - correct reasoning, wrong solution**
  - **Incorrect interpretation of a correctly rejected hypothesis**
    - **Ex: Correct diagnosis of a physician and prescribing the wrong medicine (Marascuilo and Levin, 1970)**
    - **Solve the right problem too late (Raiffa, 1969)**

The problem in a nutshell

		Rule consistency with purpose according to economic theory	
		High	**Low**
The judicial quality of the rule	**High**	**Good law based upon good economics** *Successful regulation and good outlooks for correct interventions at market failure*	**Good law based upon bad economics** *Regulatory failure. Arbitrary effects of clear and foreseeable rules*
	Low	**Bad law based upon good economics** *Regulatory failure, low foreseeability* *High uncertainty about the actual rule ex ante, high administration and enforcement burden + correct individual results*	**Bad law based upon bad economics** *Complete regulatory failure - arbitrary results of unpredictable processes*

+ Risk for enforcement failure, corruption, budgetary constraints etc…

Collusion (?) to raise prices…



Case: MD 2004:21, The Road building cartel

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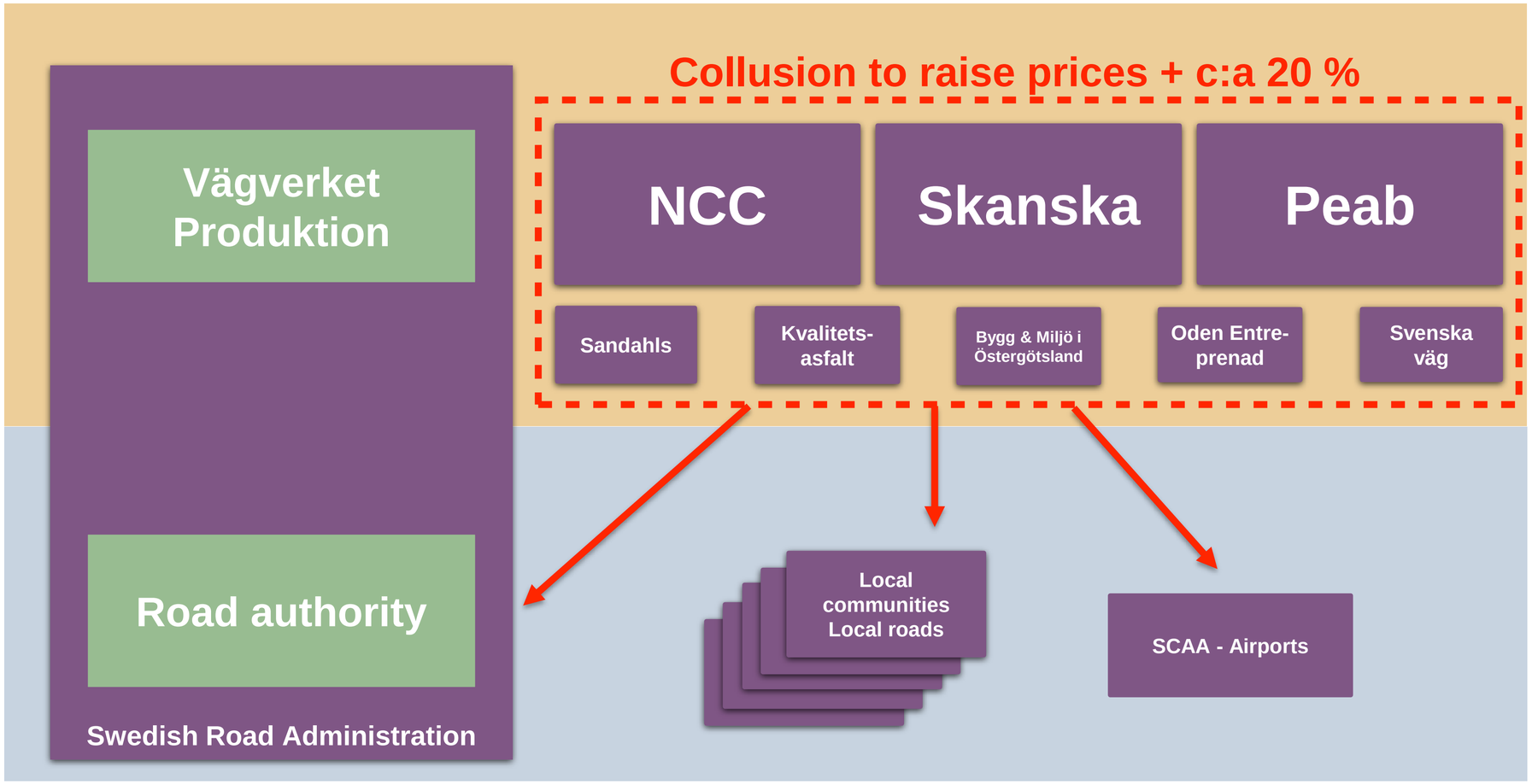

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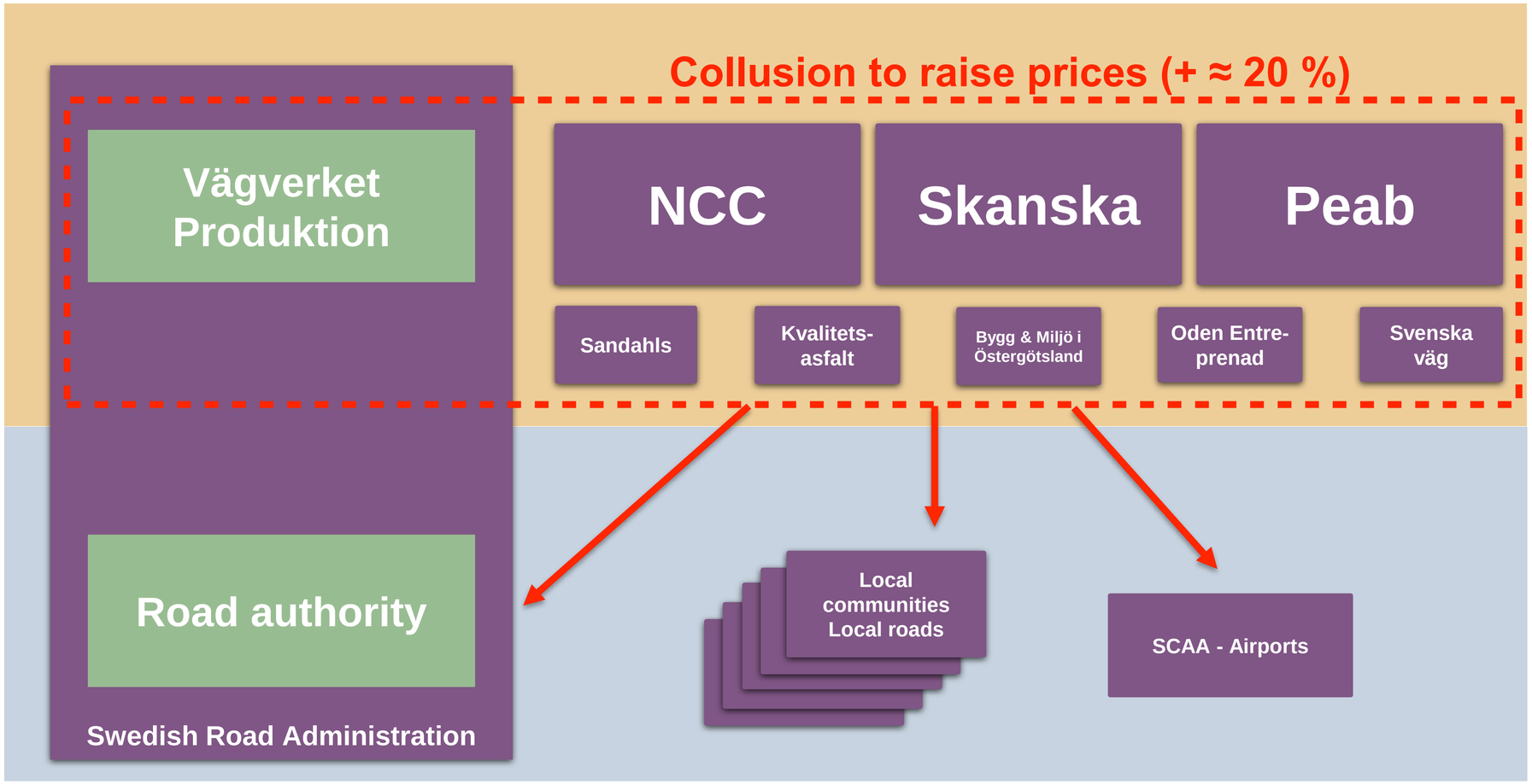
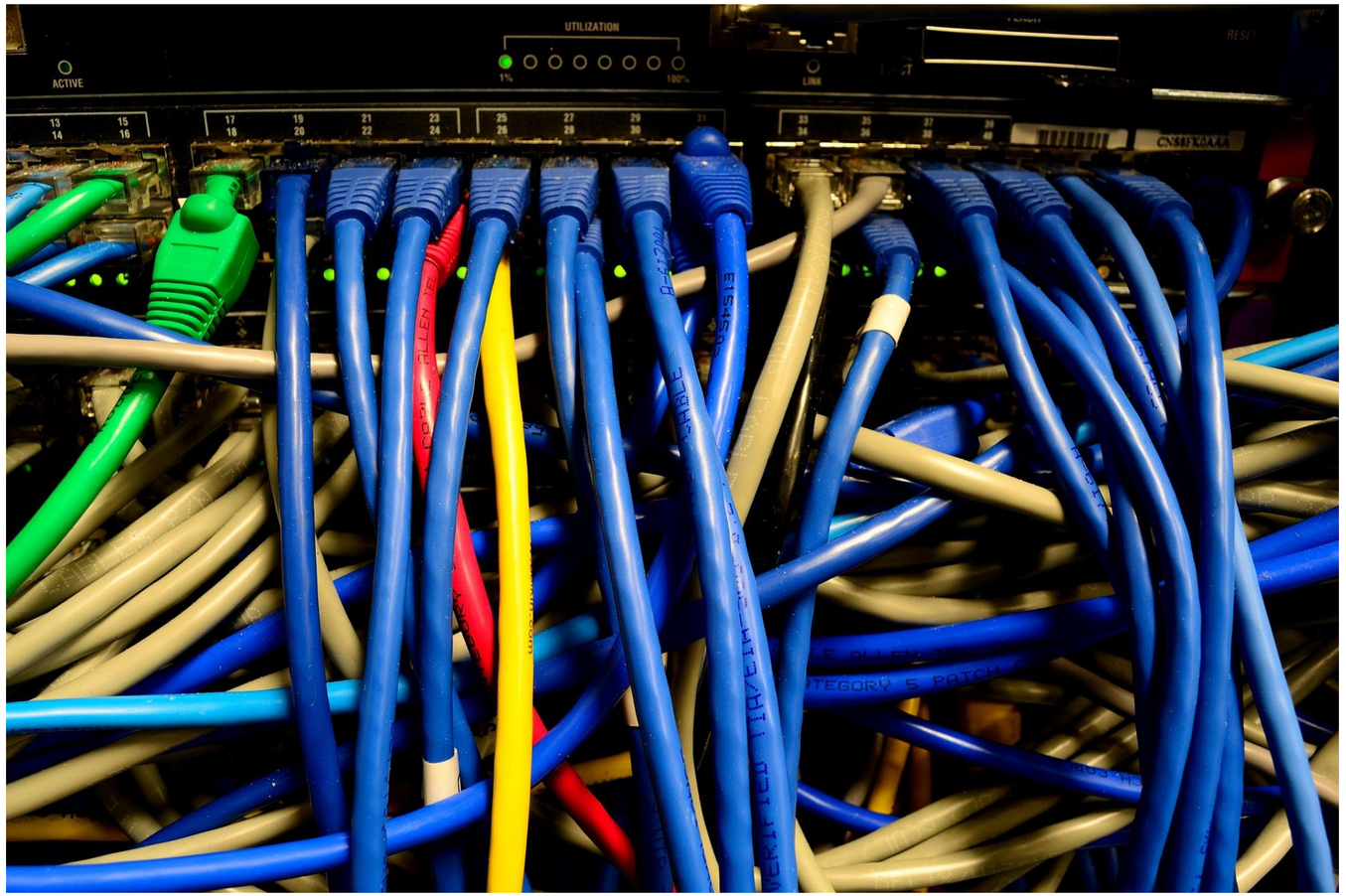
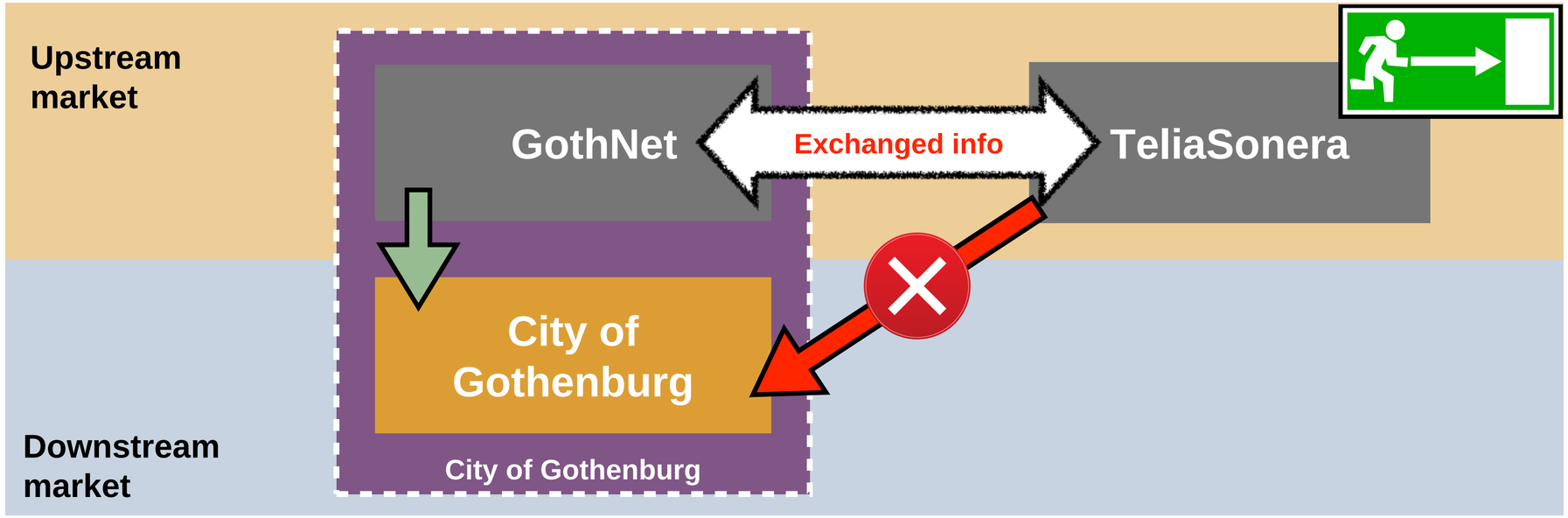


Case: PMT 17299-14, SCA v GothNet/TeliaSonera

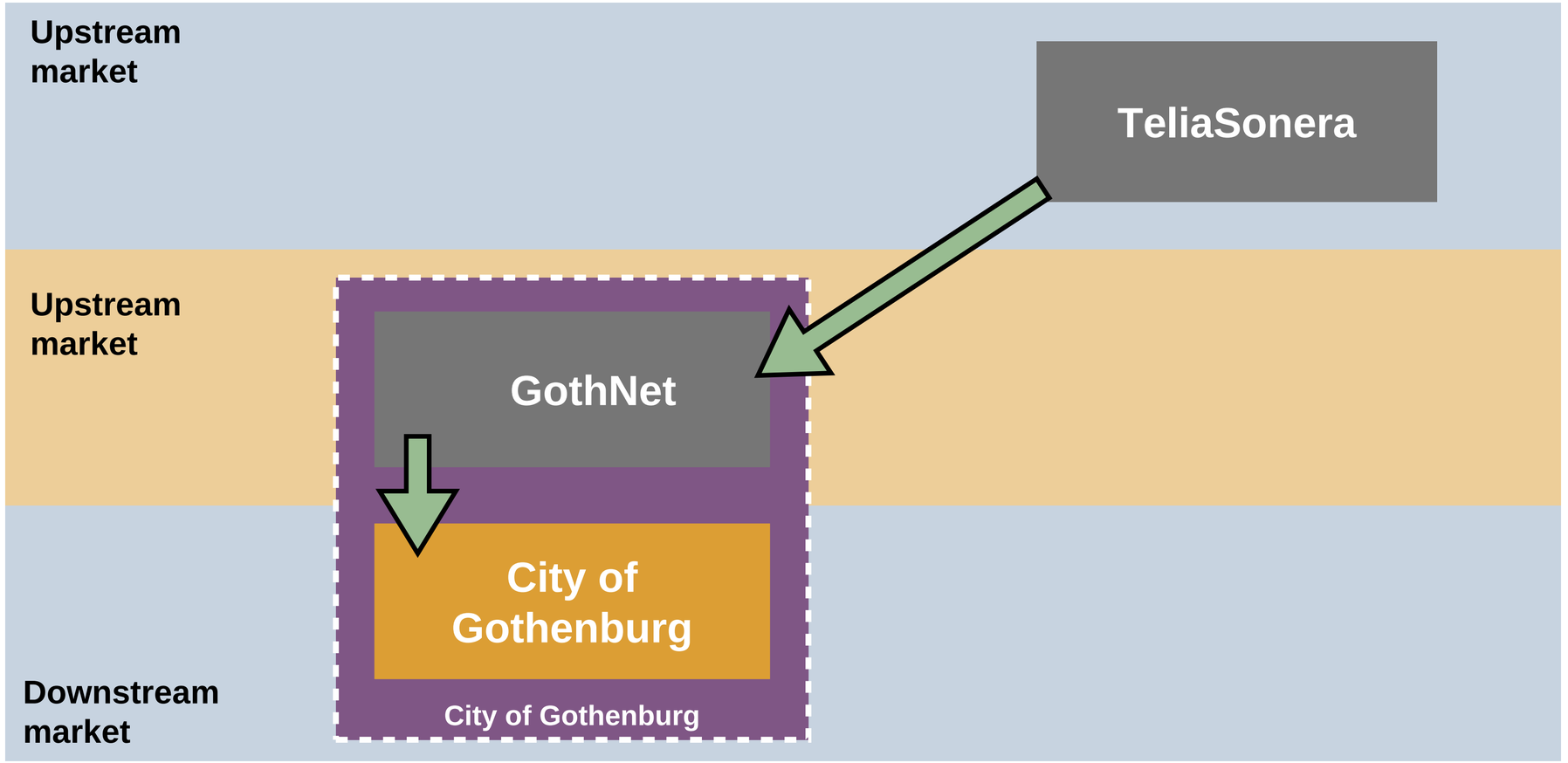
- **Data communication services**



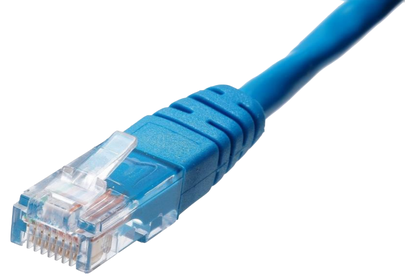
The case in a nutshell



The case in a nutshell



What markets were affected?



- **The relevant market**
  - **TeliaSonera: OSI-model step 2–3**
  - **SCA: Fixed data communication services to end customers in Sweden**
    - **GothNet: 1,7 %**
    - **TeliaSonera: 36 %**

Open Systems Interconnection model (OSI model)

Upper layers	7	Data	**Application Layer** Message format, Human-Machine Interfaces
	6	Data	**Presentation Layer** Coding into 1s and 0s; encryption, compression
	5	Data	**Session Layer** Authentication, permissions, session restoration
Transport ice	4	Segment	**Transport Layer** End-to-end error control
	3	Packs	**Network Layer** Network addressing; routing or switching
	2	Frames	**Data Link Layer** Error detection, flow control on physical link
	1	Bits	**Physical Layer** Bit stream: physical medium, method of representing bits

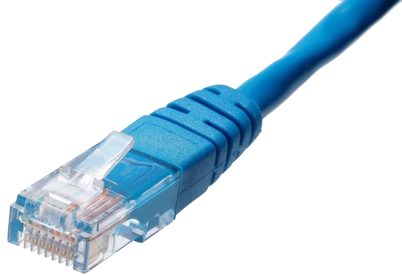
TeliaDataNet

Telia Wan

Legal assessment

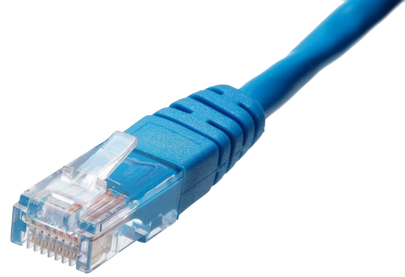
- **Questions considered by the Court**
  - **Did TeliaSonera have capacity to submit a tender?**
    - **Were employees at TeliaSonera authorised to enter into an agreement with GothNet?**
  - **Is GothNet an undertaking within the meaning of [Art. 101 TFEU] /Chapter 2, section 1 CA?**
    - **Was the agreement an internal transaction?**
  - **If there was an agreement: Restriction by object or effect?**
    - **Regardless thereof: is the restriction appreciable?**
    - **Is the agreement/concerted practice exempted?**
  - **If infringement – impose administrative fines?**
    - **How much?**

Was there an agreement?



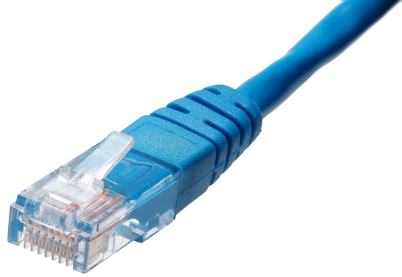
- **Did the parties enter into an agreement?**
  - **Considerable correspondence between the parties, but inconclusive and no actual contract**
    - **In dubio pro reo (cf C-199/92 P, Hüls)**
    - **Sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (cf. C-452/11 P, Heineken Nederland)**
      - **Unfounded**

If not agreement…



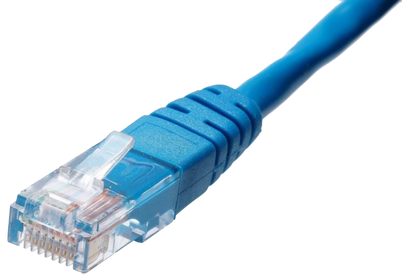
- **… concerted practice?**
  - **Proven that TeliaSonera prior to the procurement informed GothNet that TeliaSonera**
    - **Had no intention of submitting a tender**
    - **Announced its aspiration to become sub-supplier to GothNet**
      - **Thereby improving it's chances to get a contract with GothNet (vis-à-vis other suppliers)**
  - **Concerted practice by means of information exchange**
    - **C-8/08, T-Mobile Netherlands:**
      - "… forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves … such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition …".
      - "Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors … may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails."
    - **T-377/06, Comap:**
      - "… it must be noted that, whether or not it was an isolated incident, this contact was linked to pricing policy on the … market.
      - … the argument that that exchange was not anti-competitive owing to the lack of reciprocity or the fact that the applicant itself had already decided to increase prices is not relevant. … an exchange of information does not have to be reciprocal for the principle of autonomous conduct on the market to be undermined. It follows from the case-law that the disclosure of sensitive information removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information" (para

The Concept of Concerted Practices



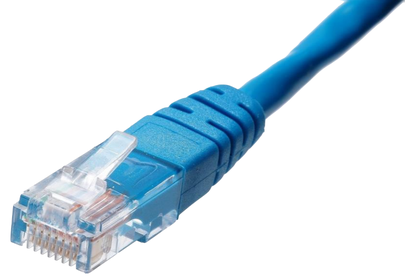
- **Implications from case law**
  - **Implies subsequent conduct on the market and a relationship of cause and effect between the two.**
    - **(in addition to the participating undertakings concerting with each other)**
  - **Subject to proof to the contrary, which the economic operators concerned must adduce**
    - **it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market.**
      - **All the more the case where the undertakings concert together on a regular basis over a long period.**
  - **A concerted practice is caught by Article 101(1) TFEU, even in the absence of anti-competitive effects on the market**
    - **Cf. Case C-8/08, T-Mobile**

Disputed issues



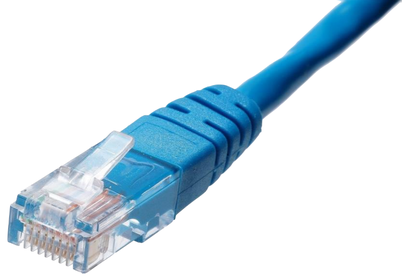
- **The parties' view**
  - GothNet: The information had no value as they had to anticipate other tenders
  - TeliaSonera: Exited the market after having disclosed info
- **Patent and Market Court**
  - One-off disclosures of info is enough!
  - TeliaSonera remained on the market
    - Wrong market definition + holding potential capacity
  - Not demonstrated that the parties did not act on the information
  - Not enough to anticipate other tenders when the front runner decided not the submit a tender
  - Uncertainty remained over a LOI between the parties

Likelihood of shortage



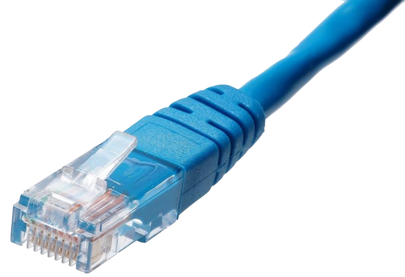
- **Did TeliaSonera have capacity to deliver?**
  - **TeliaSonera asserted that they had not adequate capacity to submit an own tender**
    - **Although: Reversed burden of proof due to conduct of manifestly anti-competitive nature + inappropriate to allocate the burden to the SCA**
    - **Standard of proof not so high - appropriate to use an overweight principle**
      - **’Objectively necessary’**
  - **Assessment**
    - **No internal documents verified inability to deliver, unspecified assertions**
    - **Competitors were able to deliver**
      - **Surprised that Telenor, TDC, Tele2 and TeliaSonera did not submit tenders**
    - **’Economically not interesting’ ≠ unable to deliver**
  - **On balance: Not likely that TeliaSonera lacked capacity**

The confusion issue



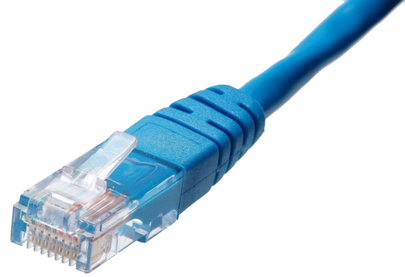
- **Was GothNet an ’undertaking’?**
  - **Facts in the view of the Court**
    - **Acted during the procurement in competition with other undertakings**
    - **Concerned an economic activity**
    - **Decided its own prices**
      - **Not akin to political decisions and public administration**
      - **Governing documents of GothNet did not entail micro management**
      - **GothNet operated on commercial terms**
  - **Yes; GothNet was indeed an ’undertaking’**

Was it an agreement outside Art. 101(1)?



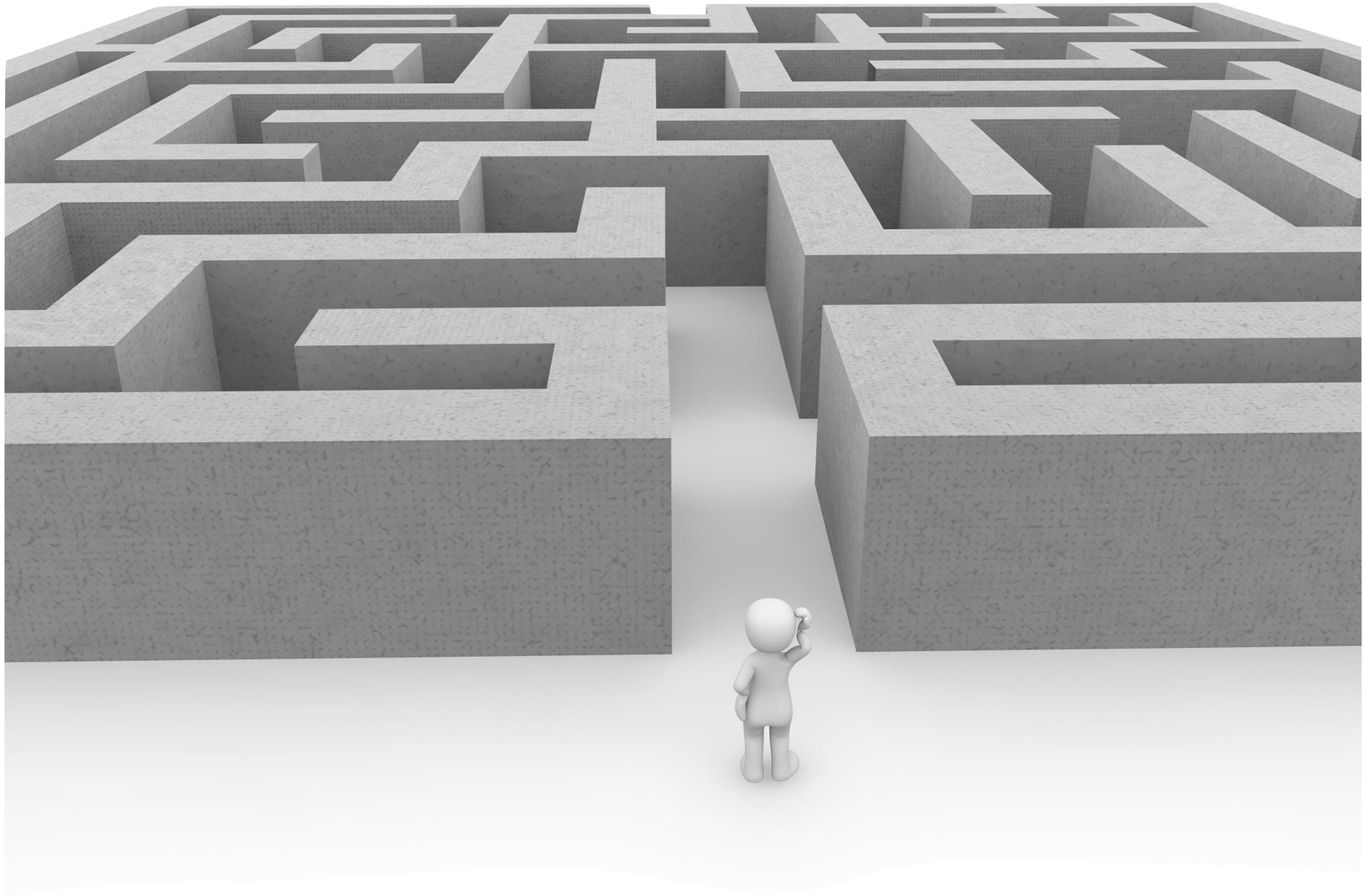
- **Internal transaction?**
  - **An economic unity?**
    - **When a subsidiary does not enjoy commercial freedom e.g. when it is subject to 100 % control of a parent company = agreement within one and the same company group falls outside the scope of Article 101.1 TFEU**
      - **However, national case law suggest that when an authority acts (vis-à-vis itself) in the capacity of a supplier it cannot be ruled out that a conduct shall be deemed anti-competitive**
      - **Cf. also EFTA-court case E-29/15, *Sorpa* on the notion of trading parties**
        - ”the Court fails to see why companies belonging to the same group as the dominant undertaking should not be regarded as trading parties of that undertaking within the meaning of Article 54(2)(c) EEA. Same group companies may contract with the dominant undertaking and either receive goods or services from that undertaking or provide it with goods or services. They should as such be regarded as trading parties of the dominant undertaking within the meaning of Article 54(2)(c) EEA. … **Only** if a company belonging to the same group as the dominant undertaking has no economic activity of its own and forms one undertaking with the dominant undertaking, may it avoid qualification as a trading party of the dominant undertaking within the meaning of Article 54(2)(c) EEA”
        - ”Unless they form one undertaking with that cooperative.”
  - **GothNet and TeliaSonera not in the same economic unity**
  - **ONLY internal transactions escape Article 101.1 TFEU**
    - **Which it was not. Hence; restrictive**

Object or effect?



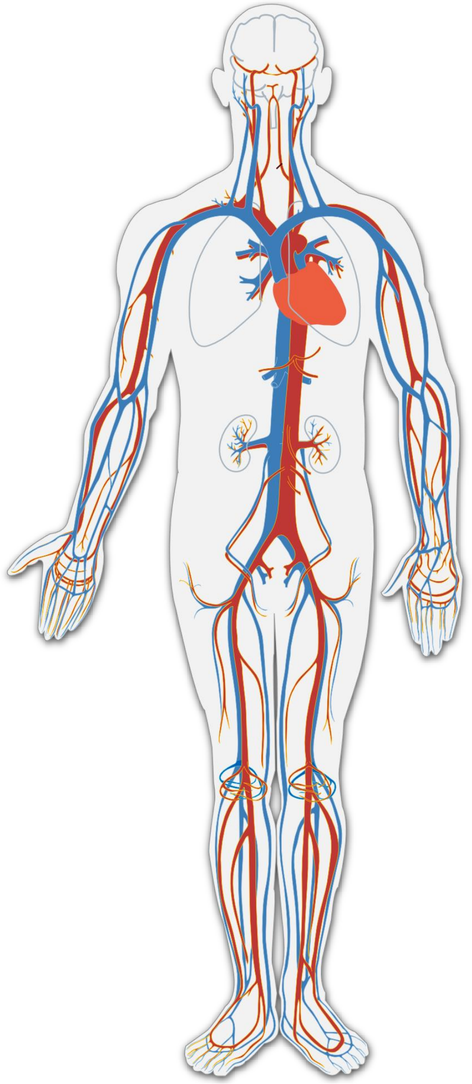
- **Nature of the restriction (viewed objectively)**
  - **First step: Prima facie restriction?**
    - **The object of the conduct was to reduce the risk of competition between tenderers**
      - **Gives the deliberately disclosed party an advantage + creates an advantage for the abstaining company to become a sub-supplier (an act of 'good faith') + Reduced the uncertainty about TeliaSonera's future market conduct**
        - Case C-8/08, T-Mobile: "…an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object…"
      - **The procurement itself contributed to the restriction and TeliaSonera could (or should) have challenged the contracting authority instead**
  - **Next step: Consider the legal and economic context**
    - **Revealing a sufficient degree of harm to competition (see C-67/13 P, CB)**
      - **Context: Expensive to invest in copper lines and fibre optics = first mover advantages = No supplier has full access to necessary infrastructure = Necessary to source supply of services from competitors**
        - GothNet owned the infrastructure already in Gothenburg + TeliaSonera was the current sub-supplier to GothNet + TeliaSonera had to purchase services from Skanova (owned by TeliaSonera)
        - The restriction was designed to permanent the current market conditions

Case T-12304-13, *SCA v Aleris et al*



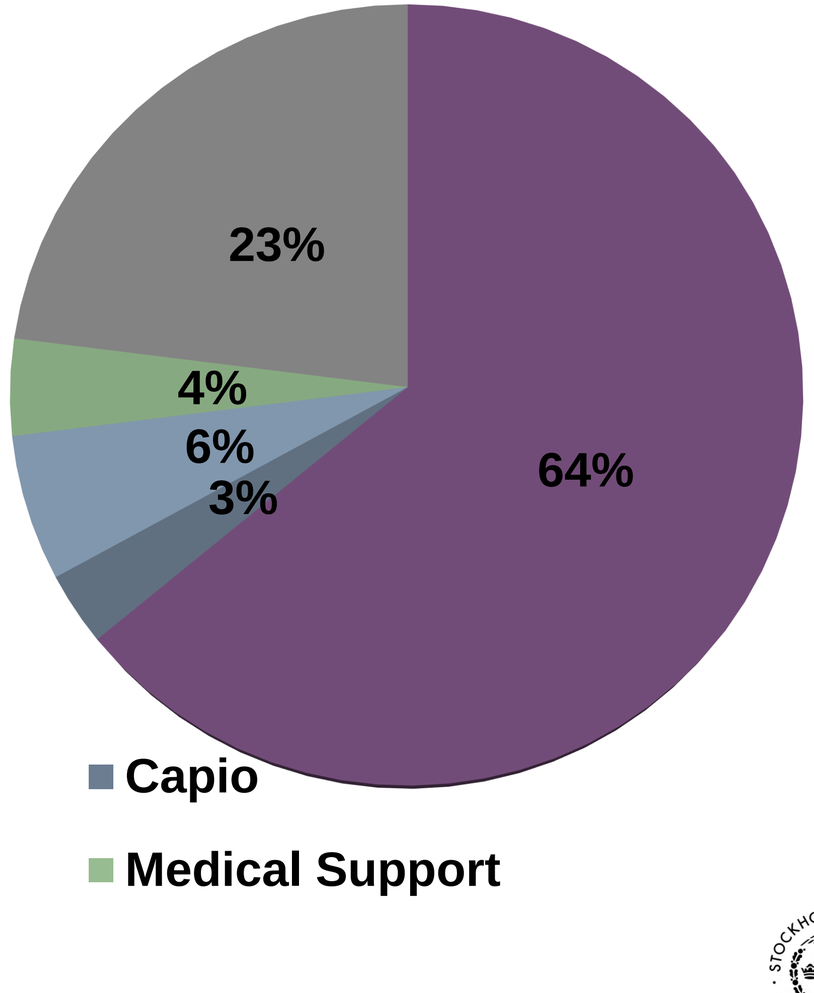
Case T-12304-13, *SCA v Aleris et al*

- **The market for clinical physiology**
  - **Medical specialty in health care with a special focus on the diagnosis of diseases in the heart and lung function, but also in other organs**
  - **Support function for other medical care services**
    - **Doctors within e.g. primary care units remits patients to a specialist in clinical physiology for examination of functions in e.g. heart, blood vessels, lungs or kidneys**
  - **Assist the health service in interpreting symptoms and investigative findings and summarising the patient's condition in the form of a diagnosis.**



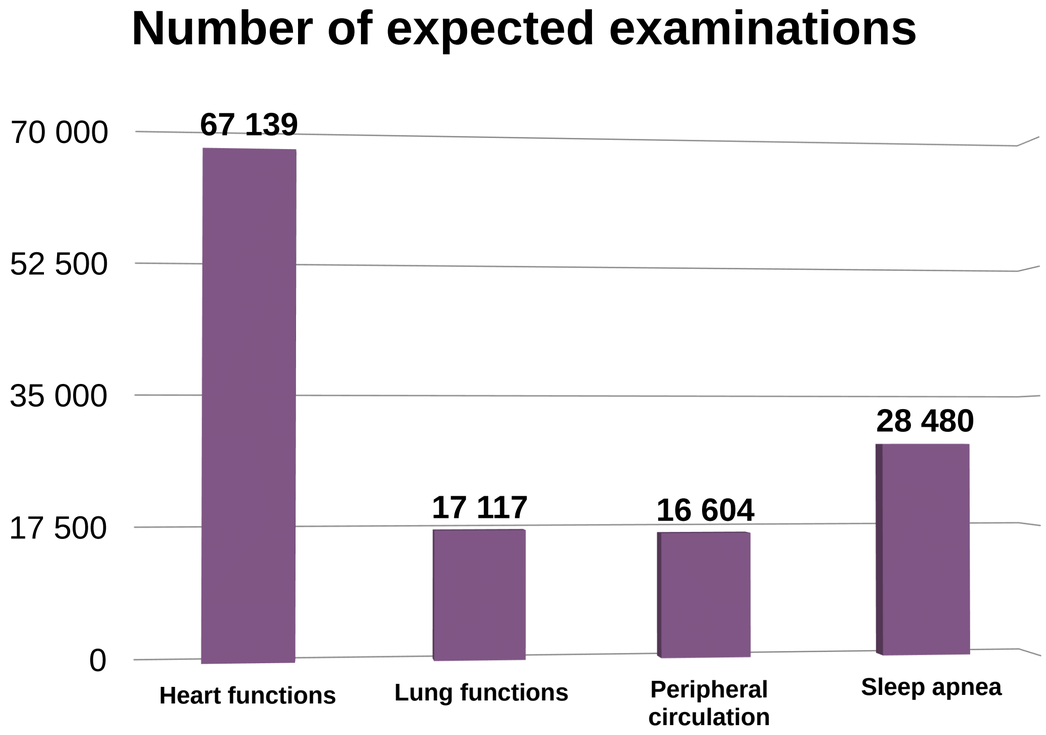
The Market

- **Who is on that market?**
  - **County-run hospitals; Södersjukhuset, Danderyds sjukhus, Karolinska, Tiohundra (Norrtälje)**
  - **Private operators**
    - **Aleris, Capio, Stockholm Heart Center, Globen Heart, Medical Support**
      - **90 % of services provided to the County (Stockholms Läns Landsting, SLL)**
      - **Private operators provide 90 % of SLL's requirements for clinical physiology**
      - **Public procurement of clinical health services**



Procuring clinical physiology services

- **Public Procurement of services in 2008**
  - **Procurement of different areas or ’objects’ including clinical physiology resulting in framework agreements for inter alia**
    - Examinations of heart functions: occupational physiology and cardiac diagnosis + clinical physiology
    - Studies related to lung function diagnosis and blood analyses
    - Studies related to peripheral circulation diagnostics
    - Sleep apnea examinations
  - **Possibility to submit tenders on individual parts**
  - **Estimated contract value: SEK 211 million ≈ €22 million**
  - **Lowest price, 2 contracts to be awarded**
    - Some operators would loose their current contract and would either exit the market or become sub-supplier to the winning operator(s)



The collusion

- **A meeting was held between the private operators**
  - **Co-operation agreement between Aleris & Capio + Aleris, Globen Heart & Medical Support**
    - **Right for loosing party, but no duty, to become sub-supplier**
      - **Price: 98 % of the contracting price with SLL**
    - **Information exchange clause**
- **Contract award**
  - **Aleris & Capio the biggest losers**
    - **Globen Heart, Medical Support and Stockholm Heart Center were awarded framework agreement in Sept 2009 on services clinical physiology (all areas)**
    - **Capio was awarded a contract within Heart and Aleris within Sleep apnea**
      - **This triggered the co-operation agreements**

Bad players…

- **SCA's view on restriction of competition**
  - **Market sharing agreement (volumes)**
    - **Minimising risk of loosing volumes, even for parties left without contract with SLL**
  - **Information exchange on upcoming tenders**
  - **Adversely affected the parties incentives to fully compete for public contracts + reduced competition on price**
    - **Commonality in cost structures etc., loser's guarantee for business…**
  - **Theory of harm**
    - **Higher costs for tax payers**
    - **Game theoretic approach - the agreement were designed to change the rules of the game**

The Court’s view

- **An agreement on restricting competition**
  - **Aleris+Capio: Volume sharing agreement**
  - **Aleris+Globen Heart+Medical Support: Volume sharing agreement**
    - **Concerted practice at least**
- **Restriction by object or effect?**
  - **The raison d’être of the agreements**
    - **To protect the commercial interests of the loosing (NB! not the winning) party**
      - **Not to ensure that patients could have a one stop shop**
      - **Primarily a defensive manoeuvre to ensure the commercial well being of the loosing parties**
    - **Not a traditional sub-supplier agreement**
  - **The agreements were typically designed**
    - **to adversely affect price competition and designed to distort competition**
    - **to cement the prevailing market situation and reduce the dynamics of public procurement**
    - **in principle to diminish possibility to grow on the merits by surrendering business to others**
      - **Expansion, M&As or other co-operation agreement superfluous or impossible**

What was the problem?

- **What about the legal and economic context?**
  - **Capio & HKG claimed that they lacked capacity**
    - Burden of proof: Companies must demonstrate that the agreement was necessary
    - Hybrid model of joint selling scheme
    - Lacking capacity: Companies must demonstrate that (objectively)
      - Contracting document did not indicate any certain capacity requirement + only award criteria was lowest price
      - Companies unable to demonstrate likelihood of lacking capacity
  - **SLL opened up for sub-contracting**
    - Should be identified in the tender
    - SLL perceived as a very tough buyer
    - SLL knew (or should have known) about the co-operation
      - Overt or not did not change the existence of an infringement

Article 18, Directive 2014/24/EU

- **Procurement principles**
  - **Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.**
  - **The design of the procurement shall not be made with the intention of … artificially narrowing competition.**
    - **Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators**

Thank you!