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New Swedish rules proposed to make it easier to combat unlawful state aid

In October 2011 a remit proposing a much longed-for new national act on state aid was presented. Currently Sweden has no national legislation concerning the application of the European Union's state aid rules. There are, therefore, limited opportunities to bring legal actions in Swedish courts concerning unlawful state aid and the recovery of state aid is not regulated. There is still a long way to go before a national act on state aid can be in place, but this is a welcome step in that direction. Most state aid cases in Sweden are tried under the Swedish Local Government Act, which governs who is entitled to appeal and the timeframe for an appeal.

During the last eighteen months, the administrative courts ruled in seven cases concerning state aid brought before the courts under the Local Government Act, amongst them two Supreme Court rulings; E.E. v. Årjängs kommun (judgment of the Supreme Administrative Court, RÅ 2010 ref. 119 I, 10 December 2010), Karlskrona kommun v. E.E., M-L.L. et al (judgment of the Supreme Administrative Court, RÅ 2010 ref 119 II, 10 December 2010) and M.B and H.D v. Göteborgs kommun (judgment of the Gothenburg Administrative Court of Appeal, case no 7739-09, 28 March 2011).

In December 2011 the General Court ruled in a Swedish case concerning the sale of real property in the municipality of Jämtland (Konsum Nord ekonomisk förening v. the European Commission, case no T-244/07, 13 December 2011). The General Court overruled the Commission's decision stating that the Commission had made an error in its assessment of the transaction. There is also a recent Commission decision regarding the sale of a municipal property. It may be noted that most of these cases concerns sale of real property.

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Currently Sweden does not have any national legislation concerning the application of the European Union's state aid rules. Furthermore, there are no specific provisions regarding legal actions regarding state aid before Swedish courts. Most state aid cases have so far been tried under the Swedish Local Government Act which includes provisions prohibiting aid to an individual business proprietor. When making a complaint under the Local Government Act, only citizens with registered domicile or owning property in the municipality have standing. This means that competitors of beneficiaries have very limited possibilities of contesting state aid. In addition, there is a limited period of three weeks from when the decision was announced within which it may be appealed.

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The Swedish Government recently published a remit assessing the need for Swedish state aid regulations. The working group, commonly called the State Aid Committee (Committee), proposes in its remit (SOU 2011:62) the introduction of a new act concerning the application of the European Union's state aid rules. In short the following is proposed;

- The act should contain regulations concerning the responsibilities of providers and beneficiaries when aid is in the process of being granted or has been granted in violation of the standstill obligation. These rules should make clear that anyone who has received unlawful aid is to repay the aid plus interest, and that the party which has granted the unlawful aid is to recover the aid.
- Procedural provisions in cases concerning unlawful aid. These provisions cover legal action brought by a provider concerning repayment of unlawful aid by a beneficiary, and actions brought by a competitor of a beneficiary. Actions brought by a competitor can deal with a prohibition on granting unlawful aid, the repayment of unlawful aid, the recovery of such aid and a claim for damages resulting from such aid. It is also proposed that a competitor of a company which is in the process of receiving unlawful aid should be able to bring action against the provider and the beneficiary at the same time, seeking a prohibition on implementing the aid. Interim injunctions will also be possible.
- Since cases regarding unlawful aid have many issues in common with some cases under the Swedish Competition Act, the Committee proposes that cases concerning unlawful aid should be examined in the same order as competition cases where the Stockholm District Court is the court of first instance. Appeals against judgments and decisions by the Stockholm District Court shall be handled by the Swedish Market Court.

The time for comments on the remit expired 1 March 2012, and Delphi was amongst those commenting upon the remit. The next step in the legislative process will be a Bill to the Legal Council, followed by a Governmental Bill. The legislation, if accepted, will enter into force at the earliest in 2013.

Recent case-law

E.E. v. Årjängs kommun, judgment of the Supreme Administrative Court, RÅ 2010 ref. 119, 10 December 2010

The municipal council of Årjäng sold a property to an individual in a swap agreement where the individual paid SEK 650 000 (approximately EUR 70 000). In the same agreement the individual sold another real property to the municipality for the amount of SEK 4.9 million (approximately EUR 527 000).

A citizen of the municipality appealed the decision to sell the property and claimed that the swap agreement constituted unlawful aid to an individual business proprietor and that it was contrary to the principle of good economic governance. Furthermore, he claimed that it was contrary to the provisions on state aid in Article 107(1) TFEU.

The Administrative County Court of Värmland did not consider that the municipality's acquisition of the property constituted aid to an individual business proprietor, thus the decision was not contrary to Article 107 (1) TFEU, nor was it contrary to the provisions in the Local Government Act regarding good economic governance. The appeal was dismissed.

The Gothenburg Administrative Court of Appeal stated, however, upon appeal that the lawfulness of the transaction had to be assessed in accordance with the state aid provisions of the TFEU. The Administrative Court of Appeal was however not of the opinion that the

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complainant could invoke the principle of efficiency in order to gain a relief of the burden of proof which had been claimed by the complainant. According to the Administrative Court of Appeal he had not been able to show that the swap agreement, by deviation from the market value, was contrary to the provisions on state aid. The appeal was thus dismissed.

The Administrative Supreme Court stated in its judgment that the transaction in question had not had as its object, or as its effect, the provision of aid to the counter party. The municipality had carried out an independent valuation of the properties where the property transferred by the municipality had an estimated value of SEK 600 000 (approximately EUR 64 000) and the property transferred by the individual had an estimated value of SEK 5.5 million (approximately EUR 591 000). Based on this, the Supreme Administrative Court found that the transaction was not contrary to the Local Government Act. Furthermore the transaction was found not to constitute unlawful state aid. The appeal was thus dismissed on these grounds.

Karlskrona kommun v. E.E., M-L.L. et al, judgment of the Supreme Administrative Court of Appeal, case no 126-10, RÅ 2010 ref 119, 10 December 2010

The Municipality of Karlskrona sold a real property to a large property development company, NCC, for SEK 5 million (approximately EUR 538 000) in spite the fact that a higher bid had been given by a competitor of NCC.

The Administrative County Court of Blekinge found that the decision to sell the property to NCC at a lower price than otherwise offered was contrary to the provisions in the Local Government Act regarding aid to an individual business proprietor and that the decision should be overruled. The Jönköping Administrative Court of Appeal came to the same conclusion as the County Administrative Court. According to the Swedish act on application of the state aid rules of the European Union, there is an obligation to notify the Government regarding any planned aid measures. In the case of the sale of property to NCC no notification was made. The Administrative Court of Appeal found that the decision should be overruled on this ground.

The Supreme Administrative Court concluded in its judgment that the agreement between the municipality and NCC did constitute an individual aid to the company. The Supreme Administrative Court pointed in particular to the fact that the content of the bid from the competitor and the fact that no independent valuation of the property had been made, when making its assessment. The Supreme Administrative Court found that the decision was contrary to Chapter 2, Section 8 of the Local Government Act and dismissed the municipality's appeal. The Supreme Administrative Court did not find any reason to assess whether the decision also meant that the obligation to notify the measure according to Section 6 of the Swedish act on application of the state aid rules of the European Union was set aside.

M.B and H.D v. Göteborgs kommun, judgment of the Gothenburg Administrative Court of Appeal case no 7739-09, 28 March 2011

The Administrative Court of Appeal found in its judgment of 28 March 2011 that the Municipality of Gothenburg had breached the enforcement prohibition in the TFEU when it, without prior notification to the Government, decided to grant a company a guarantee for a loan.

The municipality of Gothenburg had decided to grant a company, Renova AB, a guarantee for the building of a new incinerator at the thermal power station in Sävenäs. Renova is a company owned by the municipality which carries out waste disposal and recycling. The municipality of Gothenburg owned, at the time of the decision, 83.7 percent of the company. All owner

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municipalities had granted guarantees in relation to their share in the company. The guarantee of the municipality of Gothenburg amounted to SEK 544 million (approximately EUR 58,5 million). According to the decision Renova would pay an annual fee for the guarantee of 0,25 percent.

M.B. and H.D., citizens with their registered domicile in the municipality of Gothenburg, appealed the decision claiming that the guarantee constituted state aid granted in breach of the enforcement prohibition in the TFEU since the fee was not set at a competitive level.

The municipality claimed that there was no transfer of public funds and that the guarantee had been made on competitive terms. The Administrative County Court of Gothenburg concluded in its judgment that - taking into consideration the good solvency of Renova and the fact that the guarantee did not exceed 90 percent of the loan - the guarantee was given on competitive terms. Thus, the guarantee did not constitute unlawful state aid and the appeal was dismissed.

The Gothenburg Administrative Court of Appeal issued its judgment on 28 March 2011. The Administrative Court of Appeal referred in its judgment to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (Notice) and stated that it is clear from the Notice that, regarding individual state guarantees, a prerequisite for state aid to be ruled out is that a competitive price is paid for the guarantee. If the price paid for the guarantee is at least as high as the equivalent price on the financial market which serves as a bench mark the guarantee would not constitute state aid. The Administrative Court of Appeal concluded that it was uncontested that a comparison between the total cost of the loan in question, with a guarantee, and the cost of a loan without a guarantee showed that the guarantee provided by the municipality would mean that Renova would have a saving effect, thus the guarantee conveyed an economic advantage for Renova. Furthermore, the other prerequisites for unlawful state aid were met. The Administrative Court of Appeal did not consider that the guarantee was exempted from the obligation to notify according to Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid. Since the municipality had breached the enforcement prohibition, the decision was unlawful according to Chapter 10, Section 8, paragraph 4 of the Local Government Act. The Administrative Court of Appeal declared the judgment of the Administrative Court and the decision to grant a guarantee null and void.

The judgment was not appealed to the Supreme Administrative Court.

Björn Boethius v. Vimmerby kommun, judgment of Jönköping Administrative Court of Appeal, Case no 239-11, judgment of 26 January 2012

In a recent judgment, the Administrative Court of Appeal found that the Municipality of Vimmerby did not contravene the Local Government Act when it sold 70 percent of its shares in the theme park Astrid Lindgrens Värld.

The Municipality of Vimmerby sold 70 percent of its shares in Astrid Lindgrens Värld to Saltkråkan AB for SEK 24.3 million (approximately EUR 2.6 million). Saltkråkan AB is a company owned by the relatives of the world-famous author Astrid Lindgren, who own the rights to her literary works etc. A citizen of the municipality, Björn Boethius, appealed the decision to sell the shares claiming that the municipal council's decision to approve the share purchase agreement on several grounds was contrary to the Local Government Act.

The Administrative Court of Linköping found in its judgment of 7 December 2010 (case 2247-10) that the decision was in conformity with the Local Government Act. The judgment was appealed by Björn Boethius to the Administrative Court of Appeal.

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The Administrative Court of Appeal assessed whether the decision to approve the sale constituted aid to an individual business proprietor contrary to Chapter 2, Section 8 of the Local Government Act. It also assessed whether the municipality had breached the obligation to notify a state aid measure according to Section 6 of the Swedish act on application of the state aid rules of the European Union (which provides for a notification duty to the Government) and acted in breach of Article 108(3) TFEU.

The Administrative Court of Appeal stated that it could not decide on the question whether the measure constituted unlawful state aid since this is within the exclusive competence of the Commission. However, in order to make an assessment of whether the municipality had an obligation to notify the sale, the Administrative Court of Appeal made its own assessment on whether it could constitute state aid.

In this respect the Administrative Court of Appeal found that the decisive question was whether the sale had been carried out at a competitive price. If this is the case, it is not a question regarding unlawful state aid, neither under the rules of the Treaty nor under the Local Government Act. The Administrative Court of Appeal stated that, considering the specific circumstances of the present case concerning the intellectual property issues, since all the rights to the characters in the theme park already belonged to the purchaser, the municipality – when receiving the bids for the shares and when assessing the value of Astrid Lindgrens Värld – had not acted differently than a private investor would have acted in a similar situation. It had not been shown that the sale had been carried out at a give-away price and that Saltkråkan had enjoyed an economic advantage. Given these circumstances, the municipality did not have an obligation to notify the transaction. Nor did the transaction constitute unlawful aid according to Chapter 2, Section 8 of the Local Government Act. Thus the appeal was dismissed.

The judgment has been appealed to the Supreme Administrative Court which has not yet decided whether to grant leave to appeal.

State aid cases in the EU courts concerning Sweden

Konsum Nord ekonomisk förening v. the European Commission, ECJ, Case no T-244/07, 13 December 2011

In January 2008, the Commission found in its decision 2008/366/EC that the transaction in which Konsum Jämtland, a supermarket chain, bought real property from the municipality of Jämtland in the village of Åre constituted unlawful state aid contrary to article 107(1) TFEU. The municipality of Jämtland sold the property to Konsum Jämtland in October 2005, for an amount of SEK 2 million (approximately EUR 215 000), in spite the fact that a competitor of Konsum Jämtland had offered to pay SEK 6.6 million (approximately EUR 709 600) for the property.

Following the Commission's decision, the Swedish Administrative Court of Appeal found in a judgment of 9 April 2008 (which was not appealed) that the sale constituted illegal state aid contrary to the Local Government Act.

The Commission's decision was appealed and in December 2011 the General Court issued a judgment in which it found that the Commission's decision should be overruled.

In its judgment the General Court stated that the Commission made an error of assessment when it found that the higher bid from Lidl, a competitor of Konsum Jämtland, was comparable with the price ultimately paid for the property. It thus found that the price paid should be

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given preference considering that it established a market value and that it was incorrect that the market value should be established based solely on the higher bid without considering the particular circumstances invoked by the Swedish authorities. One of the circumstances overlooked was that the transaction was only one part in a series of transactions of real property in the village of Åre where Konsum Jämtland, in order to execute the detailed development plan for Åre, had to sell its real property located in central Åre. The transaction of the property in central Åre was not mentioned in the contested transaction, why the terms of the transaction seemed more profitable to Konsum Jämtland than it was in reality. Furthermore, the bid from the competitor was not unconditional, which is why it could not be considered to establish a market value of the property. Thus the assessment of the Commission was incorrect.

The judgment has not been appealed to the ECJ.

In our view this is a landmark case as regards complex mutual property transactions, considering that the Commission's Guidelines does not give any detailed guidance on how such evaluations are to be assessed.

Commission decision no C-29/10, 8 February 2012, Municipality of Vänersborg, "Toppfrys"
The Municipality of Vänersborg sold a food processing facility, Toppfrys, to a real estate company, Hammar Nordic Plugg AB, for the amount of SEK 8 million (approximately EUR 86 000). Shortly thereafter the company sold the processing facility to a group of private investors for the amount of SEK 40 million (approximately EUR 4.3 million). The municipality of Vänersborg had, in turn, paid SEK 17 million (approximately EUR 1.8 million) for the processing facility shortly before the first sale.

Following a complaint, the Commission opened an in-depth investigation in October 2010 concerning the sale of the food processing facility. The Commission found that the Municipality of Vänersborg had sold the property well below its market value. The difference between the market value and the price paid by the buyer of the processing facility constituted state aid. The European Commission concluded in its decision that the sale of the processing facility was incompatible with the EU state aid rules. Since the sale was not carried out at market conditions, it gave the company an undue economic advantage over its competitors. The Commission therefore ordered Sweden to recover SEK 14.5 million (approximately EUR 1.61 million) from the beneficiary. The judgment has not yet been appealed (29 March 2012). The last day for submitting an appeal to the General Court is 18 April 2012.



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