

## 2. Member State system

There are no specific regulations or laws enacted to regulate the kind of procedures mentioned in question no. 1 (except as regards certain aspects of the implementation of negative commission decisions, see below section 2.2.). The answers to question no. 2 will therefore be based mainly on general Swedish procedural principles and rules.

### 2.1 Procedures concerning the direct effect of Article 93(3)

It is possible to initiate actions on infringements of Article 93(3) before administrative courts, but also before civil courts in certain situations (see below 2.1.1. and 2.1.2.).

#### 2.1.1. Procedure before administrative courts

a. An action questioning the legality of a decision granting aid without prior notification can be brought before a County Administrative Court (*Länsrätt*) as in the case mentioned in question 3. The County Administrative Courts may declare prematurely granted aid unlawful. Such a declaration will lead to the recovery of the aid. To obtain this effect, the illegality of the decision granting the aid must be established. Consequently, the action available is the lodging of an appeal claiming that the decision granting the aid is unlawful.

If the decision granting the aid has been taken by a Municipality (*kommun/landstingskommun*) it may be appealed to a County Administrative Court by any resident of the Municipality (*kommunmedlem*). The resident of the municipality does not have to be affected by the decision to have the right to appeal the decision. A non-resident of the Municipality does not have the right to appeal such a decision, even if they are affected by the decision. The only possibility for the non-resident to appeal a decision is to ask a resident of the Municipality to appeal it. Should the Court find the decision to be unlawful, i.e. that the aid has been illegally granted, the decision will be annulled. If the decision is annulled, the Municipality having taking the decision is obliged to annul the effects of the decision to the extent possible, i.e. reinstate the conditions prior to the illegal aid. (cf. the Local Government Act (*Kommunallagen* 1991:900), Chapter 10, Section 15)<sup>1</sup>.

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1 Exceptions to this rule are for example when an annulment of the effects of the decision would cause the Municipality extensive financial losses and therefore is considered unreasonable or when the undertaking having received the aid cannot repay it due to insolvency.

Decisions taken by authorities other than Municipalities may, in certain cases, be appealed to a County Administrative Court. The County Administrative Courts do not, however, have automatic jurisdiction to examine every decision taken by an authority. In each individual case the relevant legislation giving the authority the power to grant the aid must be scrutinised to determine whether it may be appealed. Should there be no such rule in the relevant law, there is no possibility of *judicial review* under Swedish law.<sup>2</sup> For decisions taken by authorities other than municipalities, the County Administrative Courts, if competent, may not only annul the decision in question but also change its substance.<sup>3</sup> If the decision is found to be illegal, the County Administrative Court's decision will normally lead to the recovery of the aid granted. The only persons entitled to lodge a complaint against a decision by an authority other than a Municipality are those directly affected by the decision. It is therefore questionable whether, *inter alia*, a competitor, not being directly affected by the decision but suffering damages from an illegally granted aid, may appeal the decision.

Cases brought before a County Administrative Court may be appealed to an Administrative Court of Appeal (*Kammarrätt*) and to the Supreme Administrative Court (*Regeringsrätten*), if leave to appeal is granted by the latter Court.

b. The County Administrative Courts have power to order injunctions and other interim measures (in interlocutory proceedings), preventing *inter alia* the actual granting/payment of the aid, cf. the Administrative Court Procedure Act (*Förvaltningsprocesslagen* 1971:291) Section 28.

Orders of the Administrative County Courts given in interlocutory proceedings may be appealed to an Administrative Court of Appeal and to the Supreme Administrative Court, if leave to appeal is granted by the latter courts.

### **2.1.2. Procedure before civil courts**

a. The question of illegally granted aid could also, conceivably, arise as a pre-trial question in proceedings before a civil court. An example could be where a third party, e.g. a competitor, wishes to obtain damages from the state for granting the aid without notifying the Commission, which would require the court in question to come to a conclusion as to whether the aid should have been notified.<sup>4</sup> Such an action could be

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<sup>2</sup> The Act regarding Judicial Review of Certain Administrative Decisions (1988:25) is not applicable to "favourable" decisions, but only to decisions imposing obligations on private persons. However, not all possibilities of review are exhausted since the decision might be tried by a higher authority, albeit not a court.

<sup>3</sup> C.f. Håkan Strömberg, *Allmän förvaltningsrätt*, 18 ed. 1997, p. 209.

<sup>4</sup> It is however not evident for a company having suffered damages from the government's decision to be awarded compensation. The Swedish Tort Liability Act (1972:207) is currently under revision in this respect (SOU 1997:194) but as to date a decision taken by the Government or the Parliament has to be unnullled or changed before damages can be granted which means that a successful action to annul the decision in an administrative court is a prerequisite for the awarding of damages.

based on the Swedish Torts Liability Act (*Skadeståndslagen* 1972:207), Chapter 3, Section 2.

b. A civil court may decide whether an authority has unlawfully granted aid to an undertaking. The Court is, however, not competent to annul the enforcement of the authority's decision.

c. As mentioned above an action against the state to obtain damages could be lodged at a Swedish civil court by, for example, a competitor to the beneficiary. It may also be possible that the beneficiary could be entitled to damages from the state if the state has given the aid without fulfilling the requirement to notify. Since the recipient of the aid cannot be considered as having committed a wrongful act, it would probably not be held liable to pay damages to a competitor suffering financial losses due to the granted aid.

## 2.2 The enforcement of negative Commission decision

According to the Swedish law implementing *inter alia* the state-aid rules of the EC Treaty, (*Lag om tillämpningen av Europeiska gemenskapernas konkurrens- och statsstödsregler* 1994:1845, Section 7), the Government may annul a Municipality or County Council's decision granting aid if the Commission (or the European Court of Justice) has declared the aid to be in breach of article 92.<sup>5</sup> Hence, the Government *ex officio* is competent to annul the decision. The courts are also bound by the decision taken by the Commission and could annul the decision if a complaint should be lodged before the Government has taken action.

It should be noted that the Courts are competent to grant injunctions or annul unlawful decisions due to the direct effect of Article 93(3), i.e. questions not relating to the direct effect of Article 92.<sup>6</sup>

## 2.3 The implementation of positive Commission decisions

A decision granting aid based on a positive Commission decision could conceivably be challenged in the same way as any other decision taken by a Swedish authority, as described above. A decision might be revoked if it, for example, has not been taken in accordance with the relevant Swedish procedural requirements. However, it is difficult to see that damages could be awarded under Swedish law in such a situation.<sup>7</sup>

<sup>5</sup> As to the enforcement of the decision, the rules in chapter 10 section 15 in the Local Government act should be applied. As mentioned above (section 2.1.1.) these rules request the authority in question to revoke the effect of the decision to the extent possible (see section 2.1.1, footnote 1).

<sup>6</sup> See Government Bill 1994/95:48, p. 13.

<sup>7</sup> According to the general rule in the Swedish Torts Act, neglect is a prerequisite for damages. It is hard to see that there should be any neglect on behalf of the authority granting an aid which is supported by a Commission decision.

### 3. Member State Cases

To the best of our knowledge there is, to date, only one judgment where a Swedish Court has applied Article 93(3)<sup>8</sup>. This case has been appealed to the Administrative Court of Appeal in Sundsvall (Kammarrätten i Sundsvall - Case no. 1965/97). Leave to appeal was given on April 27, 1998. A judgment is expected this year.

**Decision:** *Anderberg, m fl ./i. Kommunfullmäktige i Sätters kommun, case 3019-95.*  
Source/Court: Länsrätten i Dalarnas län (the County Administrative Court of Dalarna),  
Date: 03/06/97 (D)

**Facts:** In 1986 an investment group ("Kommuninvest-koncernen") was established. One of its purposes was to grant loans to local authorities and Municipality-owned companies. The group's actual business was carried out by "Kommuninvest i Sverige AB". All shares in the company were owned by "Kommuninvest Ekonomisk förening", an association which Swedish Municipalities had the right to join.

A Municipality decided to apply for membership in the association. Anderberg and others appealed the decision, formally taken by the Municipal Council ("*Kommunfullmäktige*"), to the County Administrative Court and also filed a complaint to the Commission stating that "Kommun-Invest" illegally granted State aid by *inter alia* granting loans to companies owned by the Municipality.

**Decision:** The County Administrative Court stated in its judgment that Article 93(3) has direct effect and should therefore be enforced by national courts if invoked by a party. The County Administrative Court found, however, that the case had been dealt with by the Commission, DG IV. In a letter sent from the Commission to the Swedish Permanent Representative to the European Union, the Commission confirmed that it had closed the file on the complaint filed by Anderberg and others. According to the County Administrative Court, the letter proved that the Commission had no intention to initiate proceedings under Article 93(3). Hence, the County Administrative Court did not find it necessary to examine whether the duty of notification in article 93(3) had been breached.

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<sup>8</sup> It should also be noted that one of Scandinavian Airlines System's grounds in their action against Swedish Civil Aviation Administration is based on the State aid rules. The case is currently being examined by the District Court of Norrköping (Case no. T 2746/96).