

SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

JUDGMENTS SELECTED FROM THE 2009 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

I- Information on the judgment

The Administrative Court of Appeal in Jönköping ("Kammarrätten i Jönköping"), 20.10.2008, 1036-07, Länsstyrelsen i Örebro län v. AB Göta Kanalbolag

II- Brief description of the facts and legal issues

Question of payment of aid from the European Regional Development Fund: Consultancy costs found to be not eligible as they would favour an individual undertaking and thus constitute unlawful State aid incompatible with Article 87 EC

Parties:

The applicant: The County Administrative Board in Örebro (Länsstyrelsen i Örebro län);
The defendant: AB Göta Kanalbolag.

Factual Background:

In 2005, the private undertaking AB Göta Kanalbolag was granted aid from the European Regional Development Fund with regard to the project "Göta Kanal fortsättning 2006" (Göta Kanal Continuation 2006 - Göta Kanal being a famous channel that bisects Sweden). The purpose of the aid was to strengthen the tourist infrastructure around the channel by establishing i. a. information centers and other facilities. In order to carry out part of this project called "Playful Learning", AB Göta Kanalbolag entered into an agreement in 2006 with Mr. Roland Arvidsson who had for many years worked on the pedagogical project "Professor Gullström's world". AB Göta Kanalbolag employed Mr. Roland Arvidsson as a consultant, his remuneration was calculated based on his responsibility for the establishment of a learning center, the use of the logotype "Professor Gullström", as well as the goodwill attached to his figures that were to be marketed throughout the whole channel area.

On 1 November 2006, the County Administrative Board decided that the consultancy costs incurred in relation to the establishment of Professor Gullström's world of Roland Arvidsson's remuneration were not eligible for aid. The Board found that employing of Mr. Roland Arvidsson as a consultant would constitute aid to an individual undertaking incompatible with EC State aid rules.

AB Göta kanalbolag appealed the decision arguing that the costs were eligible for aid, i. a. on the grounds that the undertaking was dependent on Mr. Roland Arvidsson's participation in the project "Playful Learning".

The Administrative Court at first instance held that the costs were eligible for aid. The Administrative Court found, having assessed the project in its entirety, that the consultancy costs in

dispute were covered by the EU project. The measures that gave rise to the consultancy costs were considered to be compatible with the overall purposes of the EU project. The Administrative Court noted in particular that the undertaking had not initiated the measures in order to obtain economic gains but in order to generally improve the infrastructure of the area and to make the area more attractive to children. The Administrative Court argued that as the costs were covered by the EU-project, they were also covered by the exemptions in Article 87(3) EC. The Administrative Court added that it would often be necessary to employ a particular undertaking or a particular person in order to carry out an EU-project and that the fact that this undertaking or person would be an economic operator who would be favored by the measure, could not lead to the conclusion that the costs would be unlawful State aid.

The County Administrative Board appealed this decision to the Administrative Court of Appeal.

III- Summary of the Court's findings

The Administrative Court of Appeal concluded that providing remuneration to AB Göta Kanalbolag in relation to the costs incurred as a result of the agreement with Mr. Roland Arvidsson would imply that public funding would be given to support his private business. It would therefore constitute unlawful State aid incompatible with the rules in Article 87 EC. The costs incurred in relation to using the logotype and goodwill were therefore not eligible for aid. The County Administrative Board was justified in refusing to remunerate the costs of Mr. Roland Arvidsson's participation in the project.

Thus, the appeal was admitted and the decision of the Administrative Court was reversed.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

The Administrative Court in Blekinge ("Länsrätten i Blekinge"), 21.10.2008, 316-08, Eva Egeskans a.o. v. Karlskrona kommun

II- Brief description of the facts and legal issues

The Administrative Court in Blekinge finds that an agreement on sale of and decontamination of a piece of land constitutes unlawful State aid under national law as well as under EC law.

Parties:

The applicant: Eva Egeskans a.o.;

The defendant: The municipality of Karlskrona.

Background:

The municipal council in Karlskrona decided to sell a piece of land to the building contract incurred by NCC for SEK 5 million. Moreover, it was agreed that the municipality should pay the costs in relation to NCC decontaminating the land (which was required if the land was to be exploited). The municipal council also promised to grant NCC a building permit after the decontamination. No bidding procedure or independent evaluation of the land was carried out.

The applicants, a large number of local residents, appealed the decision to the Administrative Court. They argued that the decision was contrary to the prohibition in the Local Governments Act ("*kommunallagen*" 1991:900) on aid to individual undertakings and that the land had not been properly valued. The same consisted of not only the land, but also the building permit and the decontamination assignment. Before entering into the disputed sales agreement, the municipality had been engaged in negotiations with another potential purchaser (Winn Hotels) and this potential purchaser had offered to pay SEK 7 million for the land. The applicants also argued that the sale was contrary to EC law and should have been notified to the Commission according to Article 88(3) EC.

The municipal council argued that NCC had invested considerable resources in the initial negotiations with the municipality and that the offer from Winn Hotels was not in line with the municipality's plans to build just one hotel on the piece of land. The offer of SEK 7 million was not found to be serious or binding. The actual purchase price of SEK 5 million was the highest price obtained per km² for commercial purposes by the municipality over the last 10 years.

III- Summary of the Court's findings

The Administrative Court found that the offer presented by Winn Hotels was not so incomplete or unclear that it could be ignored when it came to evaluating the market price of the piece of land in question. Having looked into the earlier negotiations between Winn Hotels and the municipality, the Administrative Court found that it was a serious and binding offer. The Administrative Court thus held that the offer of SEK 7 million gave a strong indication that the market price had risen to at least this amount at the relevant time. The municipality was not found to have presented any arguments that could explain why it should have been necessary to sell the land at an amount below market price. Thus, the disputed decision was annulled under the Swedish Local Governments Act.

In relation to the EC law arguments, the Administrative Court came to the conclusion that an aid was present, that the amount of this aid amounted to at least SEK 2 million, and that “*there is an affection of trade as regards building services between the Member States*”. Therefore, the municipality was found to have infringed Article 88(3) EC that is directly applicable. Consequently, the decision was annulled also on this ground.

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I - Information on the judgment

The Administrative Court in Norrbotten ("Länsrätten i Norrbottens län"), 01.12.2008, 1999-08 E, Ingolf Falk v. Övertorneå kommun

II- Brief description of the facts and legal issues

The Administrative Court in Norrbotten annuls a decision of the municipal council in Övertorneå to sell a swimming arena for SEK 1.00.

Parties:

The applicant: Ingolf Falk;

The defendant: The municipality of Övertorneå.

Background:

The applicant is a local resident. He appealed the decision of the municipal council in Övertorneå to sell a swimming pool complex for SEK 1.00 to the Administrative Court. The sale was not preceded by a public bidding procedure, or by any independent expert evaluation of the property sold. Moreover, the sale was stated to be conditional upon the conclusion of a rental agreement whereby the municipality undertook to pay a lease of SEK 495,000 per year over a period of five years for use of the swimming pool complex.

The applicant argued that the purchase price was below market price. He referred to chapter 2, Article 8 in the Local Governments Act (2 kap 8 § kommunallagen 1991:900) according to which aid to individual undertakings can only be granted under exceptional circumstances. The applicant also invoked the prohibition against State aid in Article 87(1) EC and the fact that the sale had not been notified according to Article 88(3) EC.

The municipal council denied the allegations, arguing that the swimming pool complex was in great need of restoration and that the restoration costs had been estimated at least SEK 3,440,000 over a period of three years. The municipal council argued that EC State aid rules were not applicable as the *de minimis* threshold had not been reached. Moreover, the municipal council did not find that competition, or trade between the Member States were affected.

III- Summary of the Court's findings

The Administrative Court found that the disputed decision constituted an aid to an individual undertaking contrary to the prohibition in chapter 2, article 8 in the Local Governments Act ("kommunallagen" 1991:900).

The property had not been the object of a bidding procedure nor had it been evaluated by an independent third party. The Administrative Court found it clear that an unlawful aid had been granted to an individual undertaking, since the property had been sold for SEK 1,00, and the municipality had agreed to pay an annual lease of SEK 495,000 for five years. The Administrative Court added that the municipality had not established any necessity to sell the property at an amount below market price. The decision was therefore annulled.

In relation to the question whether the aid should have been notified to the European Commission, the Administrative Court stated there was no evidence that the aid in question exceeded the *de minimis* threshold. The decision was therefore not annulled on this ground.

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I- Information on the judgment

The Administrative Court of appeal in Stockholm ("Kammarrätten I Stockholm"), 16.02.2009, 4514-07, Thomas Svensson v. Stockholms stad

II- Brief description of the facts and legal issues

The Administrative Court of Appeal finds investment by the City Council of Stockholm in expansion of broadband to be unlawful State aid that should have been notified to the Commission according to Article 88(3) EC.

Parties:

The applicant: Thomas Svensson;

The defendant: Stockholms stad.

Background:

In 2005, the City Council of Stockholm approved an “*action plan*” allowing the four main housing corporations controlled by the City to make considerable investments in broadband infrastructure. Thomas Svensson, a local resident, appealed the decision claiming that the investment would violate the Local Government Act (2 kap 8 § “*kommunallagen*” 1991:900) as well as EC State aid rules. Thomas Svensson argued i. a. that the economic plan for the investment was subject to risks that would not have been accepted by a private investor. Thomas Svensson also alleged that the decision had been taken merely on political reasons and was thereby contrary to the Market Economy Investor Principle.

The City of Stockholm argued that its decision involved no public funding, as it did not bind the housing corporations but merely constituted an approval of an investment plan at large, and that the costs of the broadband infrastructure would, in the end, be borne by the households renting apartments from the housing companies, in the form of higher rents.

The Administrative Court at first instance found that the disputed decision was in line with the Local Governments Act and did not infringe Article 88(3) EC. The Court found that Thomas Svensson had not established that the City’s calculations of the expected return rate were lower than those that a private investor would accept on a similar investment. The Court stated that the fact that not all the agreements regarding rental increases, for the financing of the broadband investments, had been negotiated and signed at the time of the City’s decision, did not mean that an acceptable level of financing had not existed. Overall, the Court found that the investment was acceptably financed and commercially justifiable. The appeal was therefore dismissed.

Thomas Svensson appealed the Administrative Court's ruling to the Administrative Court of Appeal.

III- Summary of the Court's findings

Contrary to previous Swedish rulings in this area of law, the decision of the Administrative Court of Appeal is relatively lengthy and extensively reasoned. The Administrative Court of Appeal states that the municipality has an important influence over the housing corporations and therefore the funds of the corporations may constitute State resources within the meaning of Article 87(1) EC. The

Administrative Court of Appeal thus found that the planned investment involved public means (reference Case C-482/99, Stardust Marine, [2002] ECR I-4397, paras. 51-57 and Commission Decision C 35/2005, Appingedam, p. 50, OJ L 86/2007).

In relation to advantage and the Market Economy Investor Principle, the Administrative Court of Appeal found that the municipality had not received sufficient information on the economic facts and calculations when deciding on the project. Therefore, it was considered unlikely that a private investor would have taken a similar decision.

The investment was also considered to favour the housing corporations, as well as other undertakings offering different services within the broadband sector. Consequently, the investment was also considered to be selective.

In relation to the effect on trade and the distortion of competition, the Administrative Court of Appeal stated that all the undertakings favoured were active within markets with international competition. Therefore, the municipality's investment would create a risk of distortion of competition on the different markets involved and potentially affect trade.

The Administrative Court of Appeal concluded that, considering the information available to the municipality at the time of the decision, it was possible that the investment in broadband infrastructure could be qualified as State aid according to Article 87(1) EC. The Administrative Court of Appeal stated that it did not appear that the investment would be covered by any exemption. Thus, the Administrative Court of Appeal found that the investment should have been notified to the Commission in accordance with Article 88(3) EC. The decision was therefore un under the Local Governments Act ("*kommunallagen*" 1991:900) and was annulled by the Administrative Court of Appeal.

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