
September 2012

Latest news regarding the European Commission's modernization of the state aid rules and Swedish state aid news

While the European Commission's extensive modernization of the state aid rules proceeds, Sweden will have to wait for a national legislation regarding the application of the European Union's state aid rules since the legislative process has been delayed. As case law from the Swedish courts show, Swedish administrative courts have to assess state aid cases by applying the Swedish Act on Local Governance. Partner Elisabeth Eklund and associate Jenny Crafoord report here of the latest news regarding the modernization and for news regarding Swedish state aid.

As we reported in the [Delphi newsletter 25 June](#) this year the European Commission ("the Commission") has launched an extensive project with the aim to streamline and modernize the EU state aid rules. As a part of this, the Commission has invited Member States and stakeholders to submit their opinions on a number of documents. Below we report on the latest developments of the modernization.

1. Draft Guidelines for Broadband Networks

The Commission has carried out a consultation where it invited stakeholders to submit their comments on the draft Guidelines for Broadband Networks. The current Guidelines were adopted in 2009 and the new guidelines will be adapted to the Digital Agenda of Europe which was presented in 2010 and the general modernization of the state aid rules which was presented 8 May this year. The Guidelines do not only address the funding of traditional broadband networks, but also provide guidance on how to finance very high speed, so-called next generation access networks, and also ultra-high speed broadband networks.

The object of the review of the Guidelines is to strengthen the role of the telecommunication "growth engine" of the European economy through further increased pro-competitive investments. They also aim at decreasing the administrative burden on the local authorities seeking funding or state aid approval for small individual projects.

The consultation was open for submissions from the public, organizations and authorities until 1 September 2012. During September a multilateral meeting with the Member States will be held to discuss the comments and the Commission plans to adopt the final version of the Guidelines in December 2012.

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2. The Commission invites comments on the use of the General Block Exemption Regulation

In the context of its state aid modernization initiative the Commission has launched a review of the General Block Exemption regulation ("the Regulation") which exempts certain categories of aid from the obligation of prior notification to the Commission. The review was initiated with a public consultation, where the Commission invited stakeholders' to submit their views on the functioning of the Regulation since its entry into force in 2008.

The review of the Regulation is closely linked to the upcoming review of the guidelines on environmental aid, research & development & innovation, regional and risk capital aid in the context of state aid modernization presented on 8 May this year.

In light of the submissions received and its own experience in applying the Regulation, the Commission will propose a revised draft regulation in 2013, with a view to contributing to the objectives of the state aid modernization project. Submissions can be made until 12 September 2012. See: [Consultation on The General Block Exemption Regulation \(the GBER\)](#).

3. Draft Communication on short-term export credit insurance

The Commission adopted its Communication to the Member States regarding the application of the state aid rules on short-term export credit insurance in 1997. The Communication expires on 31 December 2012.

The Commission proposes in its first draft to clarify and simplify the current rules. The current rules on short term export credit insurance define the criteria under which Member States can support exportcredit insurance in line with the EU state aid rules. Based on its experience in the application of the current Communication and in particular during the financial crisis between 2008 and 2011 the Commission proposes the following main changes:

- identification of possible market gaps that could justify state intervention;
- introduction of conditions under which such intervention can take place in line with EU state aid rules; and
- the possibility to modify the list of marketable risks countries.

Stakeholders and Member States are now invited to submit their comments on the draft by 21 September 2012. See: [Consultation on the draft Communication on short term export credit insurance](#).

4. Consultation on reform of procedures

In the context of the modernization of the state aid rules, the Commission is inviting to a consultation on the application of procedural rules in state aid investigations.

Through the consultation the Commission aims at collecting the views of the Member States and stakeholders on the two aspects of the State aid Procedural framework which

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need to be overhauled: improving the handling of complaints and ensuring that the Commission obtains complete and correct information.

The Commission considers it should be able to set its own priorities for handling complaints, in order to focus its work on cases with a potentially high impact on competition and trade in the internal market. To effectively investigate such cases, the Commission also needs efficient tools to obtain the necessary information from market participants in good time, as to deliver decisions within business-relevant timelines. The changes envisaged would also allow the Commission to launch more investigations on its own initiative in areas where significant distortions of competition threaten to hamper the functioning of the internal market. Moreover, it would enable the Commission to better ascertain how public support measures affect the markets concerned, thus accelerating the decision-making process.

The Member States and stakeholders have until 5 October 2012 to submit their views. See: [State aid modernisation: reform of State aid procedures](#).

In light of the comments received, the Commission will propose a revised regulation by December 2012 that will then be submitted to the EU Parliament and the EU Council of Ministers.

5. The Commission invites comments on use of state aid rules for supporting risk capital investments

The Commission's Guidelines on State aid to support SME access to risk capital ("the Guidelines") set out the conditions that Member States should respect when granting state aid to promote access to risk capital for SMEs in their early development stages, particularly with a view to ensuring that such aid targets a proven equity gap and does not crowd out financial markets.

The Commission is now inviting Member States and stakeholders, e.g. investors, financial intermediaries and final recipients, to provide input for the revision of the Guidelines, notably information on market developments concerning the supply of equity and debt finance to viable SMEs, feedback on the application of the Guidelines and their effects in terms of facilitating SME access to risk capitals.

The purpose of the revision of the Guidelines is to examine how the Guidelines can support the modernization of the state aid rules in order to achieve the overall objective, to foster growth and to speed up, simplify and refocus state aid control.

Comments on the Guidelines shall be submitted by 5 October 2012. See: [Consultation on the revision of the Guidelines on State aid to support SME access to risk capital](#).

September 2012**Latest news regarding the European Commission's modernization of the state aid rules and Swedish state aid news****6. The Commission invites comments on the rules for state aid for environmental protection**

A further step in the modernization of the state aid rules is the review of the Guidelines for State aid for environmental protection. The review is launched by a public consultation where Member States and stakeholders are invited to submit their views on the application of the current Guidelines.

The main objective of state aid control on the environmental protection area is to ensure that the use of public funds result in a higher level of environmental protection than would occur without the aid and to ensure that the positive effects of the aid outweigh its negative effects in terms of distortions of competition, taking into account the polluter pays principle.

The purpose of the present review is to ensure that these objectives continue to be achieved, while taking account of market, regulatory and technological developments that have taken place since the last review.

In light of the submissions received and its own experience in applying the Guidelines, the Commission will propose revised draft Guidelines in 2013, with a view to contributing to the objectives of modernizing state aid rules. Submissions to the consultation can be made until 23 October 2012. See: [Consultation on the Community Guidelines on State aid for environmental protection and environmental support measures in the General Block Exemption Regulation](#).

Swedish news and case-lawThe Swedish legislation on the application of the EU state aid rules is delayed

In October 2011 a remit (SOU 2011:62) proposing a new act concerning the application of the European Union's state aid rules was presented. The time for comments on the remit expired 1 March 2012. According to the original proposal, the new legislation would entry into force on 1 January 2013. However, the legislative process has been delayed and the new legislation is not expected to entry into force before 1 July 2013. We will get back with comments in a later newsletter as soon as the referral to the Sweden's Council on Legislation has been published.

Recent case law from Swedish courts

An unlawful agreement regarding an arena in Tierp; H Eriksson et al v. the municipality of Tierp, judgment of the Administrative Court of Uppsala 25 June 2012, case no 4959-11.

The municipality of Tierp, ("the Municipality") decided to enter into an agreement with Tierp Arena. The agreement stipulated that the Municipality – after paying 8,5 MSEK in advance – would have the right to the name of the Tierp Arena for 15 years. Furthermore, during the term of the agreement the Municipality would have access to an exhibition tent at ten occasions per year, an information platform at ten occasions per year, three places for display of advertising, external exhibition information concerning

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the Municipality and access to conference venues at ten occasions per year. When assessing whether the agreement gave an advantage for the arena company, the administrative county court applied the market economy investor principle (MEIP). This principle means, in short, that the measures taken by a public body is compared with those of a private company. The basis for the principle is that the private and the public sectors should be treated equally and that they should act under equal conditions when they make financial decisions in relation to other companies. If there is a discrepancy between the conditions under which the public body grants funding and the conditions a private investor would consider acceptable on normal market conditions, unlawful aid is presumed. Thus, it is not a question of state aid if a public body engages in a financial investment on the same conditions as a private investor would have done on market conditions.

The right to the name Tierp Arena was valued to approximately 1 MSEK for the entire term of the agreement. Regarding the right to the name, the county administrative court found that such right often is a significant asset to the holder, why the agreement in that part did not constitute such an economic advantage which the arena company would not have obtained in its regular activity. However, as regards the exhibition tents, information platforms, advertising space, exhibition information and conference venue, it could be questioned whether a private company would pay for 15 years in advance. The county administrative court found that a payment in advance of 7,5 MSEK for services which revenue stand out as uncertain, seem to be an unrealistic investment for a private company acting under normal market conditions why the agreement would mean an economic advantage for the arena company which it would not have obtained under normal circumstances.

The county administrative court also found that the measure was aimed at the arena company why the measure was to be considered as selective. Furthermore the county administrative court found that the design of Tierp Arena clearly showed that it intended to compete with arenas in other Member States. Thereby all the criteria set out in Article 107.1 TFEU was met and the measure was found to constitute unlawful state aid and the agreement should have been notified to the European Commission before entered into. Since the Municipality made the decision to enter into the agreement and pay the amount without any prior notification to the European Commission, the county administrative court found that the obligation to notify and the prohibition to put the measure in effect before a final decision regarding the measure's lawfulness, had been set aside which meant that the decision was unlawful according to Chapter 10, Section 8, paragraph 4 of the Swedish Act on Local Governance. Thus it was annulled.

The judgment of the county administrative court has been appealed to the Stockholm Administrative Court of Appeal (case no 4946-12) which has not yet decided whether it shall grant leave for appeal or not.

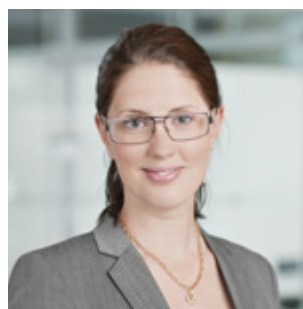
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Sale of camping in Kristinehamn had been subject to an independent expert valuation and thus it did not constitute unlawful state aid; Andersen et al v. the municipality of Kristinehamn, judgment of the Gothenburg Administrative Court of Appeal, 11 May 2012, case no 2153-11.

The municipality of Kristinehamn ("the Municipality") decided in 2010 to sell a camping to a private company for 4,9 MSEK. The decision to sell was appealed by a number of inhabitants in the Municipality who claimed that the decision should be declared null and void since, among other things, the decision to sell constituted unlawful favoring of a single company since the price for the camping was too low. The Administrative Court of Appeal found, as the county administrative court, that the Municipality prior to the sale of the camping had carried out a valuation of the camping, carried out by an independent expert, a procedure which is stated in the European Commission's Communication on State aid elements in sales of land and buildings by public authorities (97/C209/02). According to the Communication it is not necessary to sell a property through an open bidding procedure after carrying out such a valuation. The Administrative Court of Appeal thus dismissed the complaint. As we reported in the [newsletter in April this year](#) this year a number of municipalities have been convicted for selling property on non-businesslike conditions. As an example the case of the municipality of Karlskrona is worth noting (Karlskrona kommun v. E.E., M-L.L. et al, judgment by the Supreme Administrative Court, 10 December 2010, case no 126-10, RÅ 2010 ref 119) where the Supreme Administrative Court found that the selling of a property to NCC had not been carried out on businesslike conditions. The municipality of Karlskrona had not carried out an independent expert valuation, neither had it sold the property through an open bidding procedure, in fact it had not considered a higher bid from an competitor of NCC for the property. The municipality of Karlskrona had thus acted contrary to Chapter 2, Section 8 of the Swedish Act on Local Governance.



Elisabeth Eklund,
Partner / Advokat



Jenny Crafoord,
Associate