
February 2013

Improved conditions for recovery of illegal state aid and increased risks for recipients of illegal state aid – comments on the proposal for a new Swedish State Aid Act

It is currently difficult for companies to challenge illegal state aid in Sweden and recovery of illegal state aid is rare. On 7 February 2013 the Swedish Government submitted a proposal for new legislation concerning illegal state aid for review by the Council of Legislation. The proposed new act will introduce mandatory and more efficient rules for recovery of illegal state aid resulting in increased risks for public entities and recipients of illegal state aid. However, there will not, as originally suggested, be any new rules regarding access to court for third parties, such as competitors, in order to obtain injunctions or damages. The new act is proposed to enter into force on 1 July 2013. In this article partners Elisabeth Eklund and Kristian Pedersen, and associate Oscar Jansson, account for the proposal.

Background

State aid is subsidies and other economic contributions, which government authorities, municipalities, county councils or other public institutions give to private undertakings. State aid may come in many different forms, e.g. grants, guarantee commitments free of charge, sales for less than market value, beneficial loans or tax benefits. State aid which distorts competition between EU Member States is prohibited and the prohibition may be considered to be one of the fundamental aspects of EU competition law. However, until now it has been difficult for companies, having been adversely affected by illegal state aid, to take action in the Swedish courts to stop or prevent illegal aid, and there have been no clear rules on how recovery of illegal state aid is to be made.

In October 2011 the State Aid Committee (the "Committee") published its report Illegal State Aid (SOU 2011:69, "the Report"), proposing new legislation regarding illegal state aid, i.e. state aid in violation of Article 107 of the Treaty of the Functioning of European Union ("TFEU"). The proposed act was said to clarify the Swedish rules regarding jurisdiction for injunctions and preliminary injunctions, responsibilities for recovery and the terms for such recovery. The Report was summarized together with recent case law on state aid from Sweden in [Delphi's Newsletter in April 2012](#).

Provisions of the new State Aid Act

In the following we have highlighted some important points of the proposed new State Aid Act.

February 2013
**Improved conditions
for recovery of
illegal state aid and
increased risks for
recipients of illegal
state aid – comments
on the proposal for
a new Swedish State
Aid Act**

Who shall reclaim illegally state aid?

The Government proposes that the authority having provided the illegal state aid should be responsible for reclaiming it. In general it will, according to the Government, not create any problems as local authorities such as municipalities or publicly owned companies are well-suited for the task since they are well aware of the aid given. However, this may amount to quite a burdensome task if the European Commission ("the Commission") cannot properly define the receivers of a specific aid or if the amount is not specified. Despite these uncertainties the entities that have given an illegal aid must reclaim it.

When publicly owned companies reclaim aid no particular formal requirements have to be fulfilled. Municipalities and county councils, however, must observe the requirements of the Local Government Act. Aid given by Government authorities or by the Government itself shall be reclaimed by an authority mandated by the Government through an ordinance (to be appointed at a later date); although the Government states that it shares the basic view that the entity which provided the aid shall reclaim it. In specific cases the Government can provide for a custom made model (such as when the authority that gave the aid no longer exists).

Interest

Interest shall carry on illegal state aid (including state aid which has not been notified to the Commission) until approval has been granted by the Commission. If the Commission decides that an illegal aid is compatible with the Internal Market, interest shall be paid by the recipient from the day when the aid was made available until the day when the Commission issued its decision. The interest shall be calculated in accordance with the Commission Regulation EC/794/2004 (Chapter V).

The applicable forum for recovery claims

The Report suggested that the Stockholm District Court should be the court of first instance in cases of prohibition, damages or recovery of illegal state aid, and that the Market Court should be the second and last instance (as in competition law cases). However, in the Government's proposal, third parties have not been granted such standing. As recovery always requires that another court or the Commission has established that a certain state aid is illegal, the recovery claims are more similar to regular debt collection cases in general courts. Therefore the Government considers that there is no need to have special competence in the cases (which was the argument for using special forum rules). Thus, the general court system (district courts, courts of appeal and the Supreme Court) is proposed to have jurisdiction for recovery claims.

No national supervisory authority

The Report did not propose any national supervisory authority for state aid, but a majority of the respondents nevertheless suggested that the Swedish Competition Authority (Sw: Konkurrensverket) should be given the task of supervising the state aid rules in Sweden.

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The Government, however, does not propose the Competition Authority to be given the task of being the national supervisory authority as the reasons for establishing a supervisory authority, among them that local authorities have not considered themselves authorised to recover illegal state aid, are solved by the new legislation. Thus, the Government considers that there is no need for establishing a national supervisory authority.

Entry into force and the next steps in the legislative process

The new State Aid Act is proposed to enter into force on 1 July 2013. It is intended to be applicable also in relation to illegal state aid which was granted before that date.

Proposals from the Committee which will not be incorporated in the new State Aid Act

The legislation which was originally proposed by the Committee was very far-reaching and led to a lot of criticism from several stakeholders to which the Report was referred for comments. The legislation which the Government now proposes does not contain a number of the provisions originally proposed by the Committee. We believe this to be unfortunate, since the omitted rules are the ones which would have created better access to court for competitors and other parties negatively affected by illegal state aid.

There will be no possibility for third parties (e.g. competitors) to bring an action for a declaratory judgment regarding the obligation to claim recovery

The Report proposed a right to bring action to get certain aid classified as unlawful state aid. If the claim was upheld, the public authority should then claim the aid back from the recipients. Such a type of action deviates greatly from how an application for a summons is usually drafted. In the proposed type of action, the specific aid recipients did not have to be stated. This was suggested by the Committee in order to facilitate e.g. cases regarding tax relief, where the individual aid recipients are difficult to identify. The proposal in the Report also contained a provision which enabled the aid recipient to intervene on the side of the aid provider in a court action brought by a third party. However, no rules for third parties are proposed by the Government.

There will be no provisions regarding the possibly for third parties (e.g. competitors) to claim an injunction or to claim recovery of aid

The possibility of initiating action against a public authority was according to the Report intended to be available for third parties, who would be adversely affected if a certain aid would be granted. The possibility could, to a certain degree, be seen as a complement to the judicial review at the municipal and county council level for persons who lack standing to bring action under the Local Government Act. It was proposed, in the Report, that it should be possible to initiate action either against the recipient of the aid or against the aid recipient and the aid provider jointly.

February 2013
**Improved conditions
for recovery of
illegal state aid and
increased risks for
recipients of illegal
state aid – comments
on the proposal for
a new Swedish State
Aid Act**

The Government, however, quotes several respondents to the Report who questioned whether the proposals of the Report went above and beyond what is required by EU law in terms of the ability for third parties to claim injunctions etc. The Government also considers that the Report had not sufficiently investigated the basis of the proposed provisions. Due to these facts the Government doubts the necessity of legislation on the right for third party action (which as a general rule is not available under Swedish law) and thus proposes that there should be no such right.

No provision on damages

The right to damages is based on EU case law, while the question of how an action for damages is initiated, and the procedural rules for such an action, are matters of national law. EU law requires efficiency and equivalence, i.e. the possibility of getting access to legal remedies in order to enforce its rights and that these rights must not be less advantageous than corresponding national rules. In order to achieve such efficient regulation the Report proposed procedural rules in order to enable those adversely affected by illegal state aid to initiate an action for damages. The Government states however in its proposal that although it is a requirement under EU law for third parties to be able to claim damages for unlawful state aid, it is not possible to conclude under which circumstances this applies. Thus, no such provision should, according to the Government, be included in the new State Aid Act.

Comments on the proposed legislation and need for compliance

In many other areas, principles which have been established by the Court of Justice of the European Union are applied without any Swedish law incorporating these principles. Due to the fact that many of the rules now proposed are based directly on EU case law, this entails a somewhat unusual legislative technique. However, we believe that it may be positive in field of state aid law, in order to create greater awareness of the obligations of recovery. Therefore, in our opinion the proposed new State Aid Act is a first step in the right direction.

It is already now high time for all public authorities to revise their routines when granting aid and to implement procedures in order to ensure compliance with EU law. It is also important that all companies doing business with public bodies ensure that any kind of intended aid measures are legal, since the risk of recovery will be much higher than before.

However, we consider it unfortunate that there is currently no efficient way for competitors to act against illegal state aid, since the only recourse available is the Municipal Act which is only applicable in relation to municipalities and not to the State and where the rules for standing are limited and time for bringing action very scarce. This deficiency will not be solved through the proposed legislation. At the same time, once such legal proceedings take place under the Municipal Act, and someone questions aid, claims which of course are not always well founded, the recipient of the aid will still lack standing.

February 2013
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for recovery of
illegal state aid and
increased risks for
recipients of illegal
state aid – comments
on the proposal for
a new Swedish State
Aid Act**

As regards the lack of specific provisions on damages (provisions which are found in relation to both breaches of the Competition Act and the Act on Public Procurement) it shall be noted that damage proceedings previously have been brought in the general courts, which have considered themselves to have jurisdiction.

To summarize, the proposed legislation is likely to raise better awareness of the state aid rules in Sweden and to create better possibilities for recovery. However, we believe that it is unfortunate that some of the most important proposals of the Committee have been omitted in the Government's proposal. We will continue to monitor the forthcoming legislative work and will provide new comments on the final legislative proposal, The Governmental Bill, in later newsletters.



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