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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Working Party No. 2 on Competition and Regulation

COMPETITION CONCERNS IN PORTS AND PORT SERVICES

-- Sweden --

27 June 2011

The attached document is submitted to Working Party No.2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on the 27 June 2011.

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English - Or. English

1. Summary

- The great majority of the Swedish international trade has connections to the Swedish ports; therefore a well-functioning port industry is of great importance.

- Ports that are intended for commercial shipping are either owned by the State, a municipality or a private company. The most common owner of the port infrastructure is a local municipality. In difference to many other countries, the port administration and stevedoring are often integrated in Swedish ports.

- Ports face competitive constraints both from other ports and from the utilisation of other modes of transportation than shipping. The extent of substitutability is dependent on a number of factors, e.g. transportation infrastructure, the type of cargo and the distance to market.

- Ports can possess market power in relation to certain cargoes bound for certain markets. Ports have therefore been subject to investigation by the Swedish Competition Authority on a number of occasions. Potential abuses include excessive pricing and refusal to provide services.

- As a result of a collective agreement, there will only be one single company offering stevedoring services in most Swedish ports. This arrangement is referred to as The Stevedoring Monopoly.

- The Swedish Competition Authority has focused on municipal ports broadening their market scope. Municipal ports now offer services traditionally provided by the private market. Municipal ports allegedly take advantage of their market power and The Stevedoring Monopoly in the markets for e.g. forwarding shipping agents and shipbrokers.

- As of 1 January, 2010, the Swedish Competition Authority has received a complementary tool to deal with competition issues in regard to anti-competitive sales activities undertaken by the public sector. Since most Swedish ports are owned by municipalities or by companies controlled by municipalities this new provision will be of particular importance.

- As regards the new provision and the effects on competition, there is neither a *de minimis* rule applicable nor a requirement to establish a dominant position, unlike cases regarding anti-competitive agreements or abuse of a dominant position.

2. Ports in Sweden

2.1. General description

1. Sweden has the longest coast of all EU Member States. In 2008 approximately 188 million ton goods were transported over the Swedish ports, equalling 85-90 per cent of the Swedish international trade.[1] This requires smooth transitions between land and sea transportation.[2] Consequently, a well-functioning port industry is of great importance to the entire Swedish society.

[1] Sjöfartens bok, Svensk Sjöfartstidning, 2009, p. 146 och Sjöfartens bok, Svensk Sjöfartstidning, 2010, p. 141.

[2] Konkurrensförutsättningar på Hamn- och Stuverimarknaden, the Swedish Competition Authority, March 2000.

2. There are about 50 public ports in Sweden. In addition to the public ports there are around 20 industrial ports and large private quays. A public port is open to everyone and all transportations, in difference to an industrial port that generally will only accept carriages from the port owner itself.[3] Some of the public ports will specialise in certain products, ships, ferries or specialise as multi-purpose ports.[4]

3. Ports that are considered to be of strategic importance to Sweden were identified in a Swedish Government Official Report in September 2007. These ports were to be prioritised by the State in future public infrastructure investments. The concept "Strategic Port" entailed *inter alia* that the Swedish Maritime Administration would be responsible for fairway service up to the quay and that piloting services would improve with a wait of maximum three hours, in difference to five hours in other ports.

4. Ports that are intended for commercial shipping are either owned by the State, a municipality or a private company. The port services are commonly carried out in a company or in municipal administration. In difference to many other countries, the port administration and stevedoring are often integrated in Swedish ports.

5. Regardless of how the port and stevedoring services are organised, the port infrastructure, including land and quays, is most commonly owned by a municipality. Since the municipalities commonly own the port infrastructure, the municipality also fund necessary larger investments. Capital costs are often covered by administrative fees. It is rare that port infrastructure is financed through tax revenue.

6. Ports face competitive constraints both from other ports and from the utilisation of other modes of transportation than shipping. The extent of substitutability is dependent on a number of factors, e.g. transportation infrastructure, the type of cargo and the distance to market.

7. Ports can possess market power in relation to certain cargoes bound for certain markets. Ports have therefore been subject to investigation by the Swedish Competition Authority ("SCA") on a number of occasions. Potential abuses include excessive pricing and refusal to provide services.

2.2. The Stevedoring Monopoly

8. In most Swedish ports there is only one single company offering stevedoring services. This is a result of a collective agreement between the employers' organisation Ports of Sweden and the employees´ organisation The Swedish Transport Workers Union. This arrangement is referred to as The Stevedoring Monopoly.

9. The Stevedoring Company is responsible for the complete handling of the goods in the port, from arrival by land transport until the goods are stowed on board and *vice versa*. Only workers employed by a stevedoring company listed in the stevedoring agreement and that are members of Ports of Sweden are included by the collective agreement. The stevedoring agreement states that the collective agreement includes all work performed in the stevedoring company's management, including e.g. loading and unloading, mooring and keeping count of incoming and outgoing goods.

10. During the 1990-ties the SCA investigated complaints regarding port services and The Stevedoring Monopoly. [5] The complaints concerned the question whether or not the employers'

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3 Swedish Government Offical Report, SOU 2007:58, Hamnstrategi: Strategiska hamnnoder i det svenska godstransportsystemet, p. 11.

4 Sjöfartens bok, 2009, p. 146.

5 See e.g. The Swedish Competition Authority case dnr 161/1999 (only available in Swedish).

organisation's decision to appoint the companies included by the collective agreement, in the foreword to this agreement involved an act that constituted an abuse of a dominant position. The SCA did, however, not find any proof of any conduct that could impede, limit or distort competition in the relevant market.

2.3. Developments in the port sector

11. During the last fifteen years, there has been great improvement in Swedish shipping and the port sector in relation to developing the logistics. For example the procedure for handling the documentation has been simplified and advanced data systems have been constructive.[6] According to a Swedish publication on shipping, Swedish port services and commerce have become appreciably more efficient during the last years. At the same time as the number of employees decreased the turnover per employee has increased.[7]

12. Recently, the SCA has focused on municipal ports broadening their market scope. Municipal ports now offer services traditionally provided by the private sector. Municipal ports allegedly take advantage of their respectively market power and The Stevedoring Monopoly in the markets for e.g. forwarding shipping agents and shipbrokers.

3. Amendments to the Swedish Competition Act

3.1. Supplement to the Swedish Competition Act on public sales activities

13. As of 1 January, 2010, complementary rules on anti-competitive sales activities by public entities were included in the Swedish Competition Act ("the Competition Act")[8]. These rules were adopted in order to address competition issues that may arise when the public sector competes with private undertakings on open markets.

14. This new rule is intended as a supplement to the two general antitrust prohibitions, i.e. on anti-competitive agreements and on abuse of a dominant position. In the event Article 101 and/or 102 TFEU also are applicable, these provisions must be applied in accordance with Regulation 1/2003.[9]

3.2. Anti-competitive sales activities by public entities

15. According to Chapter 3, Sections 27 and 32 of the Competition Act the Stockholm City Court ("the City Court") may, on application by the SCA, prohibit a certain *conduct* by the State, a municipality or a county council within a sales activity, or a certain *sales activity* by a municipality or a county council. A condition that has to be met is that the conduct or sales activity distort, by object or effect, the conditions for effective competition in the market, or impede, by object or effect, the occurrence or the development of such competition.

16. According to Chapter 3, Section 28 of the Competition Act, the City Court may also on application by the SCA prohibit a certain conduct or activity of another legal person if the State, a municipality or a county council directly or indirectly has a decisive influence over the legal person through ownership, financial participation, applicable rules or through any other means. In other words; it

6 Konkurrensförutsättningar på Hamn- och Stuverimarknaden, p. 15 with reference.

7 Sjöfartens bok, 2009, p. 146.

8 SFS 2008:579. The act came into force 1 November 2008.

9 See Article 2, Regulation 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 101 and 102 of the TFEU, OJ 2003 L1/1.

does not matter whether e.g. a municipality chooses to run the business itself or through a company, as long as the municipality keeps the decisive influence of the company.

17. However, there are some exceptions to the new rule. According to Chapter 3, Section 27 of the Competition Act, an injunction may *not* be imposed in relation to a *conduct* that may be justified by *public interest considerations*. Furthermore, a certain *sales activity* may not be prohibited if it is *compatible with law*.

18. The criteria for prohibition of a certain conduct or a certain sales activity are summarized in Figure 1 and Figure 2 respectively below.

Figure 1: Overview of the criteria for prohibition of a certain conduct by public entities

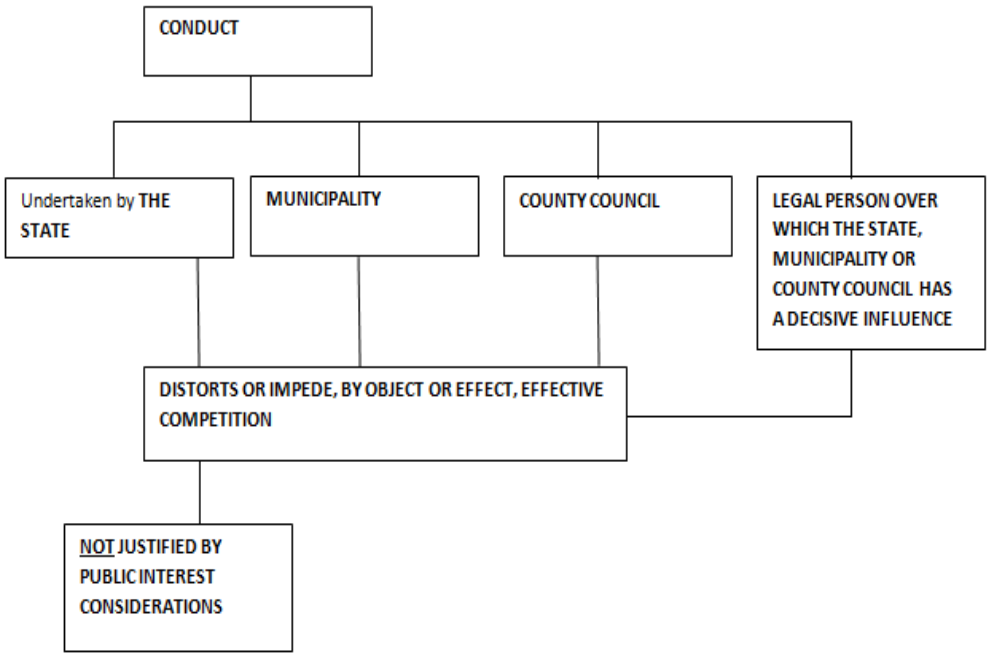
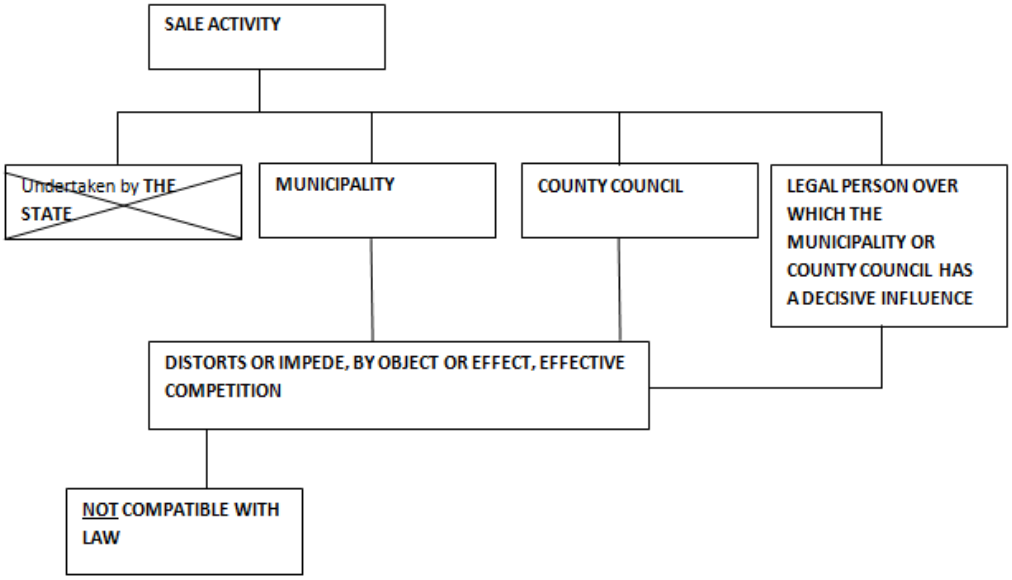


Figure 2: Overview of the criteria for prohibition of a sales activity by public entities



3.3. The Local Government Act in relation to public sales activities

19. As regards certain *sales activities* undertaken by a municipality, a county council or a legal person over whom a municipality or a county council has a decisive influence, the Swedish Local Government Act [10] ("the Local Government Act") is of specific interest to determine whether or not the sales activity in question is compatible with law.

20. Local self-government has a longstanding tradition in Sweden. Self-government at a local and regional level is exercised, respectively, by municipalities and county councils. The rules of the game for municipalities and county councils are mainly laid down in the Local Government Act.

21. Chapter 2 of the Local Government Act regulates the powers of municipalities and county councils. According to Chapter 2, Section 1 municipalities and county councils may themselves attend to matters of general concern which are connected with the area of the municipality or county council or with their members and which are not to be attended to solely by the State, another municipality, another county council or some other body. The relevant question is whether or not it is appropriate, well adapted and reasonable that the public entity takes responsibility for the matter.

22. Furthermore, according to Chapter 2, Section 7 municipalities and county councils may only engage in business activities which are conducted without a view to make profit and under the condition that it is essentially concerned with providing communal amenities or services to the benefit of the members of the municipality or county council.

[10] SFS 1991:900. The Act came into force on 1 January 1992.

4. Public sales activities in ports

4.1. Complaints to the Swedish Competition Authority

23. As has been mentioned above, the SCA has received several complaints during the years regarding the competitive situation in the port sector. Since the most common owner of a port's infrastructure in Sweden is a municipality, the new rule regarding anti-competitive sales activities by public entities is of special interest.

24. Since this new rule came into force the SCA has received complaints regarding ports, where the companies have all been fully or partially owned by a municipality.

25. The Authority gives priority to matters of broad public interest, for example sales activities that affect many companies in large parts of the country, and matters which to some extent involve principal issues. The SCA initiated further investigations based on the new rule in two cases.

26. The first case will be further described below. The second case was closed in December 2010. The SCA did not find proof that the questioned sales activities carried out by the public entity were likely to be incompatible with law, nor that any *conduct* carried out by the entity distorts or impedes the conditions for effective competition in the market.

4.2. The first port case

27. In February 2010, the SCA received a complaint regarding *inter alia* the sales activities undertaken by a company ("the Company") partially owned by a subsidiary to a municipality. The SCA decided to further investigate the Company´s sales activity in relation to the new rule regarding anti-competitive sales activities by public entities.

28. The Company is i mainly active as a forwarding shipping agency and as a shipbroker. Several private companies, who offer the same services in the port in question, complained to the SCA over the fact that the Company has advantages mainly based on its close connections to the owner; the municipality. The municipality owns the port and is indirectly the owner of a considerable percentage of the shares of the Company. Some competitors claimed that these fundamental differences in circumstances under which they act on the market lead to a distortion or impediment of the competition.

29. One question of vital importance is whether or not the Company may be regarded as a legal person in whom the municipality directly or indirectly has a decisive influence (Chapter 3, Section 28 of the Competition Act). If not, the rule regarding anti-competitive public sales activities does not apply.

30. Another crucial question is whether or not these activities can be regarded as compatible with the law. In lack of specific legislation regarding municipalities´ activities as shipbrokers or as forwarding shipping agencies, the answer to this question is whether or not the activities are compatible with the Local Government Act.

31. Finally, a key question is whether or not these sales activities distort, by object or effect, the conditions for effective competition in the market, or impede, by object or effect, the occurrence or the development of such competition. In this context, it is worth noting that unlike cases regarding anti-competitive agreements or abuse of a dominant position, there is no *de minimis* rule applicable, neither a need to establish a dominant position. Instead, according to the preparatory work of the legislation, the impact on competition has to be "of some significance". The reason for not having a *de minimis* rule is that

one might not fully be able to take into consideration the fundamental differences between public and private legal persons.[11]

4.3. Preliminary assessment of municipalities´ extended activities in ports and the legislation regarding anti-competitive sales activities by public entities

32. Without predicting the outcome of the SCA's investigation regarding the first port case, some general remarks may be made as regard municipalities´ extended activities in ports and the Swedish complementary legislation regarding anti-competitive sales activities by public entities.

33. It should be noted that at the same time as stevedoring and activities connected to the operation of a port´s infrastructure have been referred to as compatible with the legislation and case law, no similar statement exists regarding activities such as forwarding shipping agency and shipbroker activities undertaken by a municipality or a company controlled by a municipality. Furthermore, neither does any specific legislation currently exist that allows municipalities to operate on the open market as forwarding shipping agencies or shipbrokers, nor have such activities become accepted in accordance with general practice in the market.

34. The starting point of the new Swedish provision regarding municipalities´ business activities is that municipalities shall not, without any particular reason, engage in business activities in competition with the private sector. A decisive question in this regard is whether or not it is appropriate, well adapted and reasonable that a municipality enters into competition with private entities and acts e.g.as a shipping agency or as a shipbroker in a port.

35. Unlike the operation of the infrastructure of a port – which may be regarded as a matter of general concern - the services in question are not associated with great investment costs or financial risks that the industry is reluctant to take. Furthermore, in accordance with statements in the doctrine, if it seems abnormal to run a business without a view to profit, this indicates that the matter falls outside the competence of the municipality and is thus to be regarded as incompatible with law. Finally, it is doubtful whether the services in question are compatible with the Local Government Act.

[11] See Government bill, prop. 2008/09:231, p. 37.