

Department of Law

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Municipal Land Allocations: Legally Problematic but Economically Efficient?

A Study of the Relation Between Land Allocations and State Aid

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1. Introduction

1.1 Background

This thesis will examine the Swedish land allocation system's relation to competition law and economic efficiency.¹ A land allocation (markanvisning) is an option for developers that concerns the sole right to negotiate with municipalities regarding how a specific area of municipal-owned land should be exploited. The negotiations concern formulating a detailed development plan (detaljplan) and may be initiated by either the developer or the municipality.² The land is then normally transferred from the municipality to the developer at a later stage in the process.³ Land allocations initiated by developers are mainly performed through direct allocations (direktanvisningar) meaning that other developers are excluded from the process.⁴ When performing direct allocations developers often allocate resources in 'influence costs' in order to convince municipalities that they have a good and suitable plan for how to exploit the land.⁵ When municipalities, on the other hand, initiate land allocations they are mainly performed through tender allocations (anbudsanvisningar) meaning that many developers have the chance to participate in the bidding procedure.⁶ When performing tender allocations municipalities often allocate plenty of resources in formulating how they want the land to be exploited.⁷

The Swedish land allocation system might cause problems of competition law as identified by the Swedish Competition Authority (Konkurrensverket) and Carl Caesar et al.⁸ Firstly, a majority of municipalities mainly perform direct allocations, which might be problematic because small developers believe that they are hindered to entry the market since they do not have an established contact with officials of municipalities like larger developers have. An established contact with municipalities is of importance in order to receive land allocations. Thus, mainly performing direct allocations could mean problems of competition law.⁹ However, performing direct allocations seems cheaper for municipalities compared to performing tender allocations. Nevertheless, there are indications that municipalities lose financially in land revenues since land prices are identified as higher when the land is

¹ The purpose is developed in chapter 1.2.

² See section 1.1.2 for how land allocations are performed.

³ C. Caesar, T. Kalbro & H. Lind, *Bäste herren på täppan? En ESO-rapport om bostadsbyggande och kommunala markanvisningar*, Stockholm: Regeringskansliet (2013), p. 35.

⁴ See section 1.1.2 for how land allocations are performed.

⁵ See chapter 4.

⁶ See section 1.1.2 for how land allocations are performed.

⁷ See chapter 6.

⁸ See chapters 3.1 and 5.1.

⁹ See chapter 3.1.

transferred after a tender allocation. Thus, it might not be economical for municipalities to mainly perform direct allocations as they are doing today.¹⁰

Secondly, the framework concerning how land allocations should be performed is quite loose, something which could cause problems of competition law.¹¹ Many developers believe that the land allocation system lacks transparency since the proceedings vary amongst different municipalities. Developers also meet indirect conditions of implicit nature, not stated in land allocation policies, which could hinder small developers to enter the market, as they are probably less aware of the indirect conditions compared to larger developers. Moreover, there is an obligation to perform indirect expert valuations before starting direct allocation procedures but there is no guidance concerning the concept ‘indirect’ which could mean that municipalities who perform the expert valuations themselves risk breaching competition law. Thus, on the one hand, a loose regulation might lead to incorrect procedures resulting in illegal state aid.¹² On the other hand, a loose regulation might be favourable since it provides municipalities with more acting space, compared to a stricter framework, which could mean an economically efficient land allocation process.¹³

A Swedish Competition Authority report from 2013 summarizes some issues concerning the land allocation system which could be problematic considering competition law:

In many cases there is a lack of market consideration when allocating land. Decisions concerning large economic values are often made by few persons and are often vaguely motivated. The procedures are often characterized by a lack of transparency and are unpredictable. The system appears arbitrary and there are incitements for different actors on the market to act in a socioeconomically inefficient way.¹⁴

In order to come to terms with the problems, the Swedish Competition Authority suggests that a certain portion of land allocations should be performed through tender allocations since that would hinder them from risking breaching the law.¹⁵ However, their suggestion might not be the most suitable solution in order to have a land allocation system that is both legally unproblematic while still economically efficient, as will be discussed in chapter 7.

1.1.1 The Definition of a ‘Land Allocation’

The concept ‘land allocation’ has various explanations in literature. However the legal definition within domestic Swedish law, to be found in Lag (2014:899) om riktlinjer för

¹⁰ See chapter 4.

¹¹ See chapter 5.

¹² See chapter 5.

¹³ See chapter 6.

¹⁴ Konkurrensverket, *Konkurrensen i Sverige 2013*, Rapport 2013:10, pp. 66–67 (author’s own translation).

¹⁵ Konkurrensverket, Rapport 2013:10, p. 83.

kommunala markanvisningar (hereinafter *Act 2014:899*), follows:

The meaning of land allocation under this Act is an agreement between a municipality and a developer that gives the developer the exclusive right for a limited time and under given conditions to negotiate with the municipality on the transfer or assignment of a particular municipal-owned land, which is aimed for constructions.¹⁶

The expression ‘land allocation’ wrongfully indicates that the allocation itself would include transfer of land but in fact it only concerns the sole right to negotiate with municipalities about how to exploit the land. A transfer of land from the municipality to the developer is normally made at a later stage in the process.¹⁷

1.1.2 How Land Allocations are Performed

A land allocation is performed when a municipality or developer initiate negotiations concerning the use of municipal-owned land for constructions. When a land allocation is performed, the municipality and the developer sign a ‘land allocation agreement’. The agreement means that the municipality has chosen to negotiate with a specific developer concerning the exploitation of the land while the developer accepts some preliminary conditions, for example that the developer shall bear all costs during the detailed development plan process. After signing the land allocation agreement the developer has the sole right to negotiate with the municipality, which means that the municipality cannot negotiate with other developers during the time the land allocation is valid. The negotiations during the period of validity of the land allocation concerns coming to an agreement regarding a detailed development plan that both the municipality and the developer are satisfied with.¹⁸

There are two typical situations for how municipalities perform land allocations. The first situation arises when a municipality has an idea about using a land area for a specific purpose. The municipality will, in that situation, make a rough draft of a detailed development plan to attract developers for the project. The land allocation is then normally performed through a tender allocation, which means that different developers may submit bids and compete about exploiting the land. The municipality may then choose the most competent developer based on set criteria such as prize, innovation, environmental impact etc. The second situation comprises when developers propose an idea concerning how a specific area of municipal-owned land should be exploited. This method of performing land allocations is called direct allocation and means that only one developer gets the chance to submit a bid

¹⁶ SFS 2014:899, *Lag om riktlinjer för kommunala markanvisningar*, § 1. (Author’s own translation).

¹⁷ Caesar, Kalbro & Lind (2013), p. 35.

¹⁸ Caesar, Kalbro & Lind (2013), p. 38 & 47–48.

concerning exploitation of a specific area of municipal-owned land.¹⁹ Direct allocation is used *inter alia* as a way to attract developers to deliver creative ideas for how land should be developed, which should mean that the aim is to encourage developers to be creative and invest money in the initial stage of the project, in exchange that they can be more certain of receiving the land.²⁰

Land allocations are limited in time, but the time can be extended if the actors have not come to any agreement before the deadline but they both want more time to negotiate.²¹ When the municipality and the developer come to an agreement the land is typically transferred from the municipality to the developer. If the municipality and the developer have not come to any agreement when the land allocation expires, the land allocation cooperation ends and the municipality is free to negotiate with other developers concerning a detailed development plan for the land area.²²

In closing, land allocations mean that developers and municipalities can devote resources to negotiations concerning a detailed development plan since the municipality is committed to only negotiate with the specific developer, who is bound by certain conditions, which means that they both have an interest in coming to an agreement concerning the detailed development plan.²³ From the developer's perspective, a land allocation is an option to buy or lease municipal-owned land. The option can be returned if the developer for some reason does not want to fulfil the purchase. Municipalities are also free to quit the land allocation agreement, but typically have an interest in fulfilling it since they have allocated resources on formulating a detailed development plan together with the developer.²⁴

1.2 Purpose

The purpose of this thesis is to, firstly, investigate how municipalities perform land allocations, since that will give me accurate material for a judicial analysis of the system. Most municipalities mainly perform direct allocations, which seems to cause problems related to competition law and I will therefore further examine to what extent they can perform direct allocations while still complying with competition law. Moreover, the purpose of this thesis is

¹⁹ T. Madell & S. Lundberg, *Ska vi singla slant? Om försäljning av offentliga tillgångar*, Konkurrensverket (2008), p. 64–65.

²⁰ Konkurrensverket, Rapport 2015:5, p. 38.

²¹ Caesar, Kalbro & Lind (2013), p. 37.

²² C. Caesar, Disposal of municipal land aimed for housing: a critical evaluation of assigning methods applied in Sweden, In *Municipal Landownership and Housing in Sweden: Exploring links, supply and possibilities* (2016), p. 6.

²³ Caesar, Disposal of municipal land aimed for housing: a critical evaluation of assigning methods applied in Sweden (2016), p. 4.

²⁴ Caesar, Kalbro & Lind (2013), p. 37.

to analyse whether the loose land allocation framework leads to problems of competition law. Furthermore, since the main purpose of EU state aid regulations is to promote an efficient common market, I will investigate whether mainly performing direct allocation, and having a loose framework for how to perform land allocations, is economically efficient.²⁵ Lastly, I will examine whether the regulations concerning land allocations need any adjustments in order to make sure the system does not lead to problems of competition law while still being economically efficient.

1.3 Questions

From the background and the purpose of this thesis, I find four areas that are subject for investigation. They can be summarized in the following questions:

1. How do municipalities perform land allocations?
2. To what extent can municipalities perform direct allocations while still complying with competition law and being economically efficient?
3. What is the framework concerning *how* land allocations should be performed? Is it compatible with competition law and is it economically efficient?
4. What adjustments are needed in order for the system to mean fewer problems of competition law while still being economically efficient?

I find these four questions necessary to investigate in order to fulfill the purpose of this thesis. The first question will be examined in the beginning of chapters 3 and 5 by using previous research that investigates how municipalities perform land allocations. Question 2 will be examined in chapters 3 and 4 by using doctrinal analysis, EU judicial method, economic analysis of law and the transaction cost theory. Question 3 will be examined in chapters 5 and 6 by using the same methods as for question 2, and question 4 will be analyzed in the concluding discussion (chapter 7) based on the finding from chapters 3–6.

1.4 Demarcation

Not all land allocations result in transfer of land but some result in the land being leased from the municipality to the developer.²⁶ However, I will not consider situations of leasing of land in this thesis.²⁷

²⁵ K. Bacon, *European Union Law of State Aid*, Second Edition, Oxford: Oxford University Press (2013), p. 4.

²⁶ Konkurrensvetket, Rapport 2015:5, p. 72.

²⁷ See chapter 7.3 for suggestions for further research.

1.5 Material

When starting to work on this thesis, I searched for “land allocations” at Gothenburg University’s database and found an article written by Carl Caesar, who is a previous doctor in real estate science at the Royal Institute of Technology in Stockholm with focus on land allocations. His investigation indicates that the way municipalities perform land allocations could be problematic and he urges for further research to problematize the area on the basis of competition.²⁸ I contacted Caesar who sent me more material on the subject of land allocations. In the material I received from Caesar I found that there were many references to reports initiated by the Swedish Competition Authority. I contacted the Swedish Competition Authority who sent me all reports they have concerning land allocations and competition. These materials have been very useful in my work on this thesis, especially researching land allocations: both how they are performed and how the system might be problematic.

I have also searched in the database Zeteo²⁹ for Swedish case law concerning how direct allocations are performed and how EU law has been invoked in those situations. There was not much case law concerning land allocations that was relevant for this thesis. However, I found a pending case before the Stockholm Administrative Court, regarding direct allocations conformity with EU state aid regulation that was useful for this thesis.³⁰ The applicant of the case encourages the court to ask the Court of Justice of the EU (hereinafter the Court of Justice) for a preliminary ruling regarding whether article 107 of the Treaty on the Functioning of the EU (hereinafter TFEU) should be considered hindering municipalities from performing direct allocations in situations where the allocation results in transferring of the land and/or in situations where the allocation results in leasing of the land to the developer.³¹ Another useful database for this thesis was EUR-lex,³² where I have found EU case law concerning how to interpret EU state aid regulations.

While searching for guidance on the Internet I have found two pieces of Commission guidelines concerning how transfer of land should be done in order to comply with article 107 TFEU. Furthermore, I have found some books, for example *European Union Law of State Aid* written by Kelyn Bacon and *European State Aid Law and Policy* by Conor Quigley Q.C. that have been useful when considering the land allocation system’s compliance with EU state aid regulations.

²⁸ C. Caesar, Municipal land allocations: integrating planning and selection of developers while transferring public land for housing in Sweden, In *Journal of Housing and the Built Environment*, vol. 31 (2016), pp. 257–275, at p. 273.

²⁹ <https://zeteo.wolterskluwer.se/>.

³⁰ Förvaltningsrätten i Stockholm, pending case 22781-16.

³¹ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 21, para. 5.1.

³² <http://eur-lex.europa.eu/>.

When searching for material for this thesis there was no research to be found concerning expert valuations made by a third party compared to expert valuations made by municipalities themselves. Thus, I could not confirm whether the valuations differ when they are made by a third party compared to when municipalities make them, which is an aspect that is therefore excluded from my economic analysis in chapter 6. Furthermore, it should be noted that a party in a pending case, who has an interest in the outcome, initiated the data I found concerning price differences when land is transferred after direct allocations, compared to when land is transferred after tender allocations. The data still has some relevance as will be explained in chapter 3.3.1 but it would have been desirable to have some research on this subject from a neutral actor.

1.6 Method and Theory

As a starting point I will use an *interdisciplinary method* in order to analyse relevant non-judicial scientific data concerning the municipal land allocations system. An interdisciplinary method means analysing a problem not only by using knowledge from the discipline where the problem arises from but also from other types of disciplines.³³ I will analyse economics and real estate science when investigating how municipalities perform land allocations (question 1). My findings will then serve as a basis when examining the possible extent of performing land allocations while still complying with competition law and acting economically efficient (question 2) and the framework concerning how land allocations should be performed (question 3).³⁴

Subsequently, I will use *doctrinal analysis* (rättsdogmatisk metod) as described by Jan Kleineman when processing the identified problems.³⁵ I will use this method to perform my judicial analyses in chapter 3 and 5 by interpreting different legal sources, such as primary law, case law, preparatory works and literature, to analyse the identified problems. Preparatory works, such as legislative proposals, have high relevance in the Swedish legal system, but they may be challenged in situations of contrarious primary law. Swedish case law also has high relevance in interpreting primary law. However, in some situations, lower courts are not obliged to comply with case law from higher courts because it contravenes for example EU law, which is superior to national law.³⁶

³³ F. Sunnemark & M. Åberg (red.), *Tvärvetenskap: fält, perspektiv eller metod*, Lund: Studentlitteratur (2004), p. 11.

³⁴ An independent expert valuation has to be done previous to a direct allocation, see chapter 5.3.1.

³⁵ J. Kleineman, Rättsdogmatisk metod, In *Juridisk Metodlära*, F. Korling & M. Zamboni (red.), Lund: Studentlitteratur (2014), p. 21.

³⁶ Kleineman (2014), pp. 32–33.

Additionally, I will use *EU judicial method* as described by J. Reichel, J. Hettne and I. Otken Eriksson when interpreting EU law for my judicial analyses in chapter 3 and 5. The EU legal sources consist of regulations, international agreements and general principles of law. Case law from the Court of Justice and the Tribunal generally has the same legal relevance as mentioned sources. Legal sources that are not binding but used as guidance of how to interpret EU law consist of recommendations and reports, preparatory works, literature, economic theories, and suggestions from advocate generals.³⁷

The Treaty on the Functioning of the EU has direct effect in member states and is superior in case of a conflict with national law.³⁸ Therefore, articles 107–109 TFEU are of great importance when it comes to analysing problems of competition law concerning the Swedish land allocation system. In the *CILFIT* case the Court of Justice stated that provisions of EU law should always be interpreted in the light of the EU law as a whole, which is an aspect I will take into consideration in my concluding discussion (chapter 7.2).³⁹

General principles of EU law have a high relevance and meet three important functions; they fill in gaps in laws, they interpret secondary law and they constitute a baseline in order to define the validity of secondary law.⁴⁰ There are several principles concerning what impact EU law has in member states. One important principle is, for example, the principle of *sincere cooperation*,⁴¹ which states that the EU and the member states shall, in full mutual respect, assist each other in carrying out tasks that flow from the Treaties. Member states have to undertake measures in order to fulfil their obligations and refrain from any measure, which could jeopardise the attainment of the Union's objectives.⁴² Since the EU does not have an effective capability of carrying out their regulations, the principle of *effet utile* obliges member states to make sure EU law has uniform effect in all member states.⁴³

The Court of Justice plays an important role in the development and interpretation of EU law. The judgements from the Court of Justice have effect in all member states in the way that they provide them with guidance on how to interpret EU law. The Court of Justice considers itself having an obligation to take integration policies into consideration when judging, meaning that they judge in the light of the harmonious development of the EU.

³⁷ J. Hettne & I. Otken Eriksson (red.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning*, Second Edition, Stockholm: Norstedts Juridik (2011), pp. 40–41.

³⁸ Case 6/64, *Costa v E.N.E.L.*, 15 July 1964, p. 218.

³⁹ Case 283/81, *CILFIT*, 6 October 1982, para. 20.

⁴⁰ J. Reichel, EU-rättslig metod, In *Juridisk Metodlära*, F. Korling & M. Zamboni (red.), Lund: Studentlitteratur (2014), p. 126.

⁴¹ Article 4(3) of the Treaty on the European Union (TEU).

⁴² Reichel (2014), p. 112–113.

⁴³ Reichel (2014), p. 112–113.

Judgements from the Court of Justice are sometimes designated to the lawmakers when the Court considers it necessary to change the legal position.⁴⁴

Another source of EU law that has attained a strong legal position is soft law, which consists of non-binding secondary law from EU administrative bodies, sometimes in cooperation with national bodies. These documents constitute clarifications, guidance etc., in order to facilitate a uniform interpretation of EU law and they have a strong position as a legal source when there is a lack of other guidance. The legal position of soft law results in member states not being the sole bodies of carrying out EU law and case law from the Court of Justice has also been complemented where necessary.⁴⁵ In case *Grimaldi* the Court of Justice stated that national courts might be obligated to use soft law as basis of interpretation when it supports the interpretation of national regulation that is based on the soft law or when its purpose is to fill out gaps for binding EU regulation.⁴⁶ The Commission has an important role when it comes to state aid: It is, for example, stated in the Treaties that the Commission shall review all situations of state aid in member states and, when necessary, decide that a measure shall be abrogated or changed.⁴⁷ Consequently, soft law from the Commission in situations of state aid should be considered to have a high legal relevance.

Moreover, I will use *economic analysis of law* as described by Vladimir Bastidas Venegas,⁴⁸ when performing the economic analyses in chapter 4 and 6. The method focuses on investigating economic efficiency, which means using economic resources in a way that promotes high economic welfare for all actors on the market.⁴⁹ I will therefore analyse whether performing direct allocations means economic welfare for municipalities and developers or whether performing tender allocations would mean more economic welfare. I will also analyse whether the loose framework concerning how to perform land allocations means economic welfare for developers and municipalities or whether a stricter framework would provide more economic welfare.

When performing an *economic analysis of law* I will do an external review of the land allocation system where the real purpose of the system is to have economic efficiency. There are two standard definitions concerning economic efficiency: *Pareto efficiency* and *Kaldor-Hicks efficiency*. *Pareto efficiency* aims to increase economic welfare for at least one actor on the market without decreasing the economic welfare for the other actor(s). *Kaldor-Hicks*

⁴⁴ Hettne & Otken Eriksson (2011), p. 60.

⁴⁵ Reichel (2014), p. 127–128.

⁴⁶ Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles*, 13 December 1989, para. 18.

⁴⁷ Article 108 of the Treaty on the Functioning of the European Union (TFEU).

⁴⁸ V. Bastidas Venegas, Rättsekonomi, In *Juridisk Metodlära*, F. Korling & M. Zamboni (red.), Lund: Studentlitteratur (2014), pp. 175–205.

⁴⁹ Bastidas Venegas (2014), p. 176.

efficiency, on the other hand, aims to increase the total economic welfare meaning that the positive effects for one actor should outweigh the negative effects for the other actor(s) on the market. When applying *economic analysis of law*, I will use both positive analysis, which means I will analyse whether the land allocation system is economically efficient, and normative analysis, which means I will examine how the system should be, in order to promote more economic efficiency.⁵⁰

Furthermore, I will use the *transaction cost theory*,⁵¹ in order to analyse whether the land allocation system promotes an efficient common market within the EU, or whether the system needs improvement in order to promote more economic efficiency. The *transaction cost theory* concerns how transaction costs affect the possibility to reach economic efficiency. Transaction costs include costs for finding a contract partner, negotiations and costs for executing the contract. It is also based on the idea that individuals have self-interests and limited rationality since they do not have all the necessary information to make optimal decisions.⁵² Transaction costs, in combination with a lack of information, can result in opportunistic behaviour, which means that individuals make short-term decisions that might result in negative consequences in the long run.⁵³ According to the *Coase theorem*,⁵⁴ a world without transaction costs would mean that the resources are allocated in the most efficient way, independently of how the rights are distributed between individuals. Without transaction costs there is no need for states to intervene, since there will be agreements on the market with the most economically efficient results.⁵⁵

By using the *transaction cost theory* in chapter 4, I am going to analyse the transaction costs for developers and municipalities when performing direct allocations and compare them with the transaction costs of performing tender allocations in order to examine what procedure provides the most economic welfare. In chapter 6, I am going to analyse the transactions costs that developers and municipalities meet with today's loose framework compared to the transactions costs a stricter framework could mean in order to examine whether today's framework provides more economic welfare than a stricter framework would do. When searching for materials for this thesis I did not find any previous research concerning data covering the transactions costs when performing land allocations. My investigation will therefore be of theoretical nature.

⁵⁰ Bastidas Venegas (2014), pp. 176–177.

⁵¹ Bastidas Venegas (2014), p. 187.

⁵² Bastidas Venegas (2014), p. 187.

⁵³ Bastidas Venegas (2014), p. 187.

⁵⁴ R. H. Coase, The Problem of Social Costs, *Journal of Law and Economics*, vol. 3, 1960, pp. 1–44.

⁵⁵ Bastidas Venegas (2014), p. 188.

The *transaction cost theory* has resulted in discussions about the proper choice of rights for individuals: A *property rule* gives the holder the right to stop the using of a utility, while a *liability rule* means a judge controls the transaction and gives the holder the right to reparation from the actor who uses a utility.⁵⁶ In land allocation procedures a *property rule* would mean a possibility to stop the procedure when there are indications that it is unlawfully performed, while a *liability rule* would mean that the procedure can be carried out even though it seems unlawful but with the possibility to bring actions in court. In accordance with the *Coase theorem*, the choice between *property* and *liability rules* does not matter when there are no transaction costs. However, when dealing with transaction costs there is a need of making the most proper choice between the rules: With too high negotiation costs, the parties will not come to agreements with the most economically efficient results. In that event it might be more suitable to have a *liability rule*, which means there will be actions with lower transaction costs but a judge will decide on the matter in case of conflicts. Thus, I will take transaction costs into consideration in the concluding discussion (chapter 7.2) when analysing the available legal actions in situations where a land allocation is subject for dispute.⁵⁷

In conclusion, I will use an *interdisciplinary method* when analysing previous data concerning the land allocations system. Furthermore, I will analyse potential state aid problems in the light of *doctrinal analysis* and the *EU judicial method* described above. Moreover, I am going to analyse whether the land allocation system is motivated from an *economic analysis of law* perspective by using the *transaction cost theory*. And lastly, I will use my findings to analyse what adjustments are needed in order for the system to mean fewer problems of competition law while being economically efficient.

⁵⁶ Bastidas Venegas (2014), p. 189.

⁵⁷ Bastidas Venegas (2014), p. 190.

2. Relevant Law

This chapter will present relevant regulations that are to be used when applying *doctrinal analysis* and *EU judicial method* in this thesis. This chapter will only deal with the most frequently used regulations, which need to be presented in greater detail in order to better understand the following chapters.

2.1 Swedish Law

Act 2014:899 regulates the obligation for municipalities to adopt policies concerning land allocations if they are dealing with land allocation procedures. The legislative proposal for this act states that the legislation is meant to clarify the playing field for developers through clear and predictable evaluation criteria in municipal policies. It also states: “A land allocation policy may create transparency regarding developers’ possibilities to participate in land allocation procedures”.⁵⁸ The lack of transparency was a clearly identified problem in the report by the Swedish Competition Authority from 2013, where developers submitted that the absence of uniformity resulted in lack of transparency.⁵⁹

Paragraph 1 of Act 2014:899 contains the definition of a land allocation, which is found in section 1.1.1 above. Paragraph 2 section 1 states how the guidelines should be formulated:

A municipality shall introduce policies regarding land allocations. The policies shall contain the municipality’s starting points and goals concerning transfer or leasing of land aimed for construction, administrative routines, and basic conditions concerning land allocations. They shall also contain principles regarding price-fixing.⁶⁰

From the wording of the paragraph, you cannot distinguish any guidance concerning what aspects municipalities are obliged to take into consideration while formulating their policies. However, there is some guidance in the legislative proposal. The legislative proposal states that municipalities have an obligation to make sure that the policy clarifies in what way the municipality intends to make sure that land areas are not sold below market price. That should be done in the light of the Swedish Kommunallag (SFS 1991:900) (Municipality law) and EU state aid regulations.⁶¹ The legislative proposal also states that municipal policies are aimed at being seen as indicative guidance, meaning that they are not binding for either the municipality or the developer. Municipalities are anyhow expected to act in compliance with

⁵⁸ Prop. 2013/14:126, *En enklare planprocess*. (Stockholm: Näringsdepartementet), p. 228. (Author’s own translation).

⁵⁹ Konkurrensverket, Rapport 2013:10, p. 10.

⁶⁰ SFS 2014:899, *Lag om riktlinjer för kommunala markanvisningar*, § 2 part 1. (Author’s own translation).

⁶¹ Prop. 2013/14:126, p. 287.

their adopted policies. Municipalities are also obliged to adopt their policies before performing a land allocation, but the policy does not constitute a prerequisite for the agreement between the municipality and the developer in order to be valid. A performed land allocation, before any policies are adopted, is therefore to be considered valid.⁶²

2.2 EU Law

The main purpose when formulating articles 107–109 TFEU was to prevent national economic rivalry from stifling the creation of a common market.⁶³ Article 107(1) TFEU states that:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.⁶⁴

All of the criteria in the paragraph have to be met for the transaction to constitute illegal state aid.⁶⁵ Articles 107(2) TFEU and 107(3) TFEU contain several examples of what constitutes legal state aid. Article 107(3)(c) TFEU, for example, states that it is allowed to provide “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”.⁶⁶

Article 108(1) TFEU states that the Commission shall, together with the member states, control the compliance with the state aid regulation by reviewing all systems of aid and propose appropriate measures for member states in order for them to comply with the rules. If the Commission finds that aid granted by a member state is not compatible with the common market, in accordance with article 107 TFEU, it shall abolish or alter such aid within a period of time determined by the Commission, in accordance with article 108(2) TFEU. Article 108(3) TFEU is essential since it requires member states to inform the Commission “in sufficient time to enable it to submit its comments, of any plans to grant or alter aid”. If the Commission considers such plans not compatible with the common market, in accordance with article 107 TFEU, it shall without delay initiate the procedure provided for in article

⁶² Prop. 2013/14:126, p. 287.

⁶³ Bacon (2013), p. 4.

⁶⁴ Article 107(1) TFEU.

⁶⁵ Madell & Lundberg (2008), p. 29.

⁶⁶ Article 107(3)(c) TFEU.

108(2) TFEU. Articles 108(4) and 109 TFEU regulate how the Council may adopt appropriate regulations concerning state aid, under certain conditions.

Consequently, article 107 TFEU prohibits member states from financially supporting any company in situations where it distorts, or risks distorting, the competition and thus affects the trade within the common market. Such profits are prohibited irrespective of whether the fund derives from the state or a municipality; it should be considered prohibited as long as it derives from public funds. Illegal state aid does not solely include situations where public money is directly transferred to a company, but also situations of grants, loans with a favourable rent, selling of goods and land below market price etc. Article 107 TFEU is thus applicable in situations of municipal land transactions.⁶⁷

In order to confirm whether a transfer of land from a municipality to a company/developer constitutes illegal state aid in accordance with article 107 TFEU, the transfer should mean an economic benefit for the company that the company normally should not have received. Another criterion for article 107 TFEU to be applicable is that the transfer of land affects the competition within the common market.⁶⁸

The Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01) (hereinafter the Commission Notice) is a guidance by the Commission with the aim to “provide further clarification on the key concepts relating to the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, with a view to contributing to an easier, more transparent and more consistent application of this notion across the Union”.⁶⁹ Thus, the legal relevance of this Notice is high since it contributes to the interpretation of EU state aid regulations. National courts might even have an obligation to use the guidance provided by the Commission Notice as a basis of interpretation when ruling on state aid cases.⁷⁰

As defined in the Commission Notice, there are several acknowledged ways of determining whether a public transaction is made under market-oriented conditions. A transaction that follows (a) a bidding procedure, (b) which is exposed to competition, (c) transparent and (d) unconditional is generally to be considered made under market oriented conditions in accordance with the Commission Notice.⁷¹

⁶⁷ Madell & Lundberg (2008), pp. 28–30.

⁶⁸ Madell & Lundberg (2008), pp. 28–30.

⁶⁹ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, In *Official Journal of the European Communities*, no. C 262 (2016), pp. 1–50, at p. 3.

⁷⁰ Case C-322/88, *Grimaldi v Fonds des maladies professionnelles*, 13 December 1989, para. 18.

⁷¹ Commission Notice (2016), paras. 89–92.

However, if a transaction does not meet the requirements above for excluding state aid (a-d), it can be evaluated through different proceedings to preclude any elements of state aid. Transfer of land should then be evaluated through (a) an independent expert evaluation (b) prior to the sale negotiations to establish the market value and it should be (c) based on generally accepted market indicators and valuation standards.⁷² The Commission Notice does not clarify the conditions necessary for making a proper expert valuation. However, there is an abrogated Commission Communication from 1997 where the Commission provides more detailed information concerning how to perform an independent expert valuation. Regarding the criterion ‘independent’, the Commission Communication from 1997 follows:

The valuer should be independent in the carrying out of his tasks, i.e. public authorities should not be entitled to issue orders as regards the result of the valuation. State valuation offices and public officers or employees are to be regarded as independent provided that undue influence on their findings is effectively excluded.⁷³

Despite the fact that this communication is no longer valid, I consider it has some relevance when determining whether an expert valuation is independent, since the Commission has not formulated any new definition of the concept ‘independent’. There is no guidance in case law or literature concerning the concept ‘independent’ and what the demarcation is between dependent and independent. Instead, there is case law that gives examples of when an expert valuation is clearly independent.⁷⁴

⁷² Commission Notice (2016), para. 103.

⁷³ Commission Communication on State aid elements in sales of land and buildings by public authorities, In *Official Journal of the European Communities*, no. C 209 (1997), pp. 3–5, at p. 4.

⁷⁴ For example case T-253/12, *Hammar Nordic Plugg v Commission*, (not yet published).

3. Judicial Analysis of Direct Allocations

In this chapter I am going to investigate how frequently direct allocations are performed in municipalities and how developers may receive them. I will furthermore analyse potential legal concerns that the use of direct allocations may cause and in what situations it is legally justifiable to perform direct allocation, i.e. to what extent they should be performed; both in relation to Swedish law and in relation to EU law.

3.1 The Use of Direct Allocations in Municipalities

Most municipalities use both tender and direct allocations, the choice between them depending on the specific situation. Nonetheless, direct allocation is a more commonly used method among 48% of the municipalities compared to tender allocation, which is the most commonly used method in 40% of the municipalities.⁷⁵ The two methods are described to have different positive benefits; direct allocations may require fewer resources for the municipality because the developer often makes the planning and initiating of the project, which may create incitement for new, innovative solutions and proposals from developers. Performing tender allocations, however, is a more competitive way of distributing municipal-owned land.⁷⁶ The Swedish Competition Authority believes that the competition must increase when deciding methods for distributing land allocations. Therefore, performing tender allocation should be the most commonly used method since it is similar to public procurement.⁷⁷ Thus, despite the exhortation from the Swedish Competition Authority, most municipalities state that performing direct allocation is their most commonly used method when distributing land to developers.

It is important for developers to have an established contact with officials of the municipality in order to receive land. Small businesses on the market rarely have this position and therefore feel that they are hindered to enter the market when municipalities use direct allocations as the primary method when distributing land to developers.⁷⁸ In a survey targeted at developers from 2013, 75 out of 82 developers believed that it is essential to have good contacts with politicians in municipalities in order to receive land allocations. Moreover, 70 out of 80 developers thought that previous completed projects are of importance in order to receive land allocations.⁷⁹ Only 26 out of 80 questioned developers believed that the system

⁷⁵ Konkurrensverket, Rapport 2015:5, p. 40.

⁷⁶ Konkurrensverket, Rapport 2013:10, pp. 71–72.

⁷⁷ Konkurrensverket, Rapport 2013:10, p. 83.

⁷⁸ Caesar, Kalbro & Lind, (2013), pp. 66–67.

⁷⁹ Caesar, Kalbro & Lind, (2013), p. 66.

of land allocations in general is working well or mainly well and only 22 out of 82 developers affirmed that the system is transparent or mainly transparent.⁸⁰

The Swedish Competition Authority proposes, in a report from 2013, that there should be a requirement for municipalities to perform a certain portion of land allocations as tender procedures. They state in the same report that land allocation procedures have similarities to public procurement and it is therefore suitable to develop a regulatory framework similar to the procurement rules.⁸¹

3.2 Swedish Law

3.2.1 The Planning and Building Act

In accordance with the Planning and Building Act (Plan- och Bygglagen) (SFS 2010:900), planning of land and water is a municipality matter. This matter is called the municipality planning monopoly and concerns the sole right for municipalities to adopt plans for how the land and water within the municipality should be exploited.⁸² Municipalities have a wide leeway for deciding how to design a detailed development plan. They may, for example, decide (1) the extent of the development above and below the ground, (2) the use of buildings, and (3) the proportion of apartments of different types in residential buildings and the size of the apartments.⁸³ Thus, municipalities may legitimize their use of direct allocations by referring to their interests and right to deciding how their land should be exploited.

3.2.2 Act 2014:899

Act 2014:899 concerns the obligation for municipalities, who perform land allocations, to adopt policies for the procedure. The act does not state anything concerning to what extent allocations should be done through tender allocations. Accordingly, it is up to municipalities to decide whether their policies should include principles concerning to what extent allocations should be done through a tender procedure. However, even if municipalities were to adopt policies stating that they should perform tender allocations to a certain extent or in certain situations, they are not obliged to observe their own policies, since land allocation agreements are valid even when they go beyond the municipalities' policies⁸⁴ Thus, according to Act 2014:899, there are no restrictions for municipalities to perform direct allocations.

⁸⁰ Caesar, Kalbro & Lind, (2013), p. 65.

⁸¹ Konkurrensverket, Rapport 2013:10, pp. 84–85.

⁸² L. U. Didón, L. Magnusson, S. Molander, C. Adolfsson & J. Hjalmarsson, Plan- och bygglag (2010:900), Zeteo (2016), comment to 1 kap. 2 §.

⁸³ SFS 2010:900, *Plan- och bygglag*, chapter 4 § 11.

⁸⁴ Prop. 2013/14:126, p. 287.

3.2.3 Legality Procedure

Decisions concerning detailed development plans and land allocations may only be reviewed through a legality procedure (*laglighetsprövning*), which means that the suitability of a decision will not be reviewed. Rather the only issues subject to review are whether: (1) the decision was made through an unlawful procedure, (2) the decision does not concern a municipal matter, (3) the decision maker has overstepped her/his authority, or (4) the decision goes against the law. Each member of a municipality has the right to try and override decisions concerning detailed development plans and land allocations. The decision cannot be changed but only repealed.⁸⁵

Consequently, the Swedish regulations do not give any guidance or limitations concerning the choice of land allocation procedures. Instead, the regulation provides municipalities with a large margin of discretion when making decisions concerning how land should be exploited and what procedure they should use in order to choose a developer for the land. The available tool for reviewing whether decisions concerning detailed development plans and land allocations implies state aid constitutes that members of municipalities apply for a repeal of the decision, but without any possibilities to receive compensation or to change the decisions.

3.2.4 The Åre Case

The *Åre* case – a case from the Swedish Administrative Court of Second Instance – is a case law that provides guidance concerning the relation between transfer of land and state aid that both the Commission and the Tribunal have examined. The applicant of the case submits that a decision, made by Åre municipality, shall be abrogated since it includes state aid. The decision concerned transfer of land from Åre municipality to Konsum (a grocery store) to the price of 2 000 000 SEK, although Lidl (another grocery store) offered a price of 6 600 000 SEK.⁸⁶

The Administrative Court of First Instance ruled that the affair did not include any element of state aid since Lidl's bid arrived just before the decision was made. Another argument for excluding state aid was that the Court considered the price of 2 000 000 SEK not falling below market price "in a decisive way",⁸⁷ because the affair was motivated as part of the development of Åre city centre.

Before the Administrative Court of Second Instance brought up the case, the Commission issued a decision on the matter, with the focus of determining the market price of

⁸⁵ SFS 2010:900, *Plan- och bygglag*, chapter 13 § 1 & SFS 1991:900, *Kommunallag*, chapter 10.

⁸⁶ Länsrätten i Jämtlands Län, case 791-05 (24 May 2006), p. 1–2.

⁸⁷ Länsrätten i Jämtlands Län, case 791-05 (24 May 2006), p. 5.

the land. The Commission decided that Lidl's bid on the land should constitute the market price rather than the independent expert valuation, and therefore, the decision to set the price to 2 000 000 SEK was considered constituting state aid.⁸⁸ The submission from the defendant, that Lidl would not be able to meet the requirements of the detailed development plan, did not affect the decision. Consequently, the Swedish Administrative Court of Second Instance declared the decision abrogated.⁸⁹

The Swedish Administrative Court of Second Instance did not (and may not) consider whether the municipality should have transferred the land through a tender procedure instead of a direct procedure, since the case is ruled through a legality procedure.⁹⁰ But we can draw some conclusions from the judgement: The direct procedure, concerning transferring the land to Konsum at the price of 2 000 000 SEK, was considered incorrect even though it followed an expert valuation since there was a higher bid on the land that was considered representing the market price. From the reasoning by the Commission, which was the basis of the judgement by the Swedish Administrative Court of Second Instance, it is reasonable to draw the conclusion that a higher bid that arrives from a third party in a direct procedure could stop the procedure.

However, Åre municipality appealed the decision to the Tribunal, which invalidated the decision to abrogate Åre municipality's decision since the Commission did not take all relevant circumstances that were brought up by Åre municipality into consideration. Therefore, the bid by Lidl was considered not comparable to the actual market price for the land. Thus, the Commission had wrongfully overvalued the fact that Lidl arrived with a higher bid for the land. Consequently, a higher bid does not hinder a direct procedure when there are circumstances that make the higher bid not reflective of the market price.⁹¹ Arguing by analogy could mean that situations of direct procedures, where there are no specific circumstances that are only achievable for a specific developer, could oblige municipalities to observe a higher bid that arrives and accordingly hinder the direct procedure.

⁸⁸ State Aid – Sweden: State aid C 35/2006 (ex NN 37/2006) – Sale of land below market price Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, In *Official Journal of the European Communities*, no. C 204 (2006), pp. 5–7, paras. 18–20.

⁸⁹ Kammarrätten i Sundsvall, case 1715-06 (9 April 2008), p. 5–7.

⁹⁰ SFS 1991:900, *Kommunallag*, chapter 10 § 8.

⁹¹ Case T-244/08, *COOP Nord v Commission*, (13 December 2011), paras. 66–77.

3.3 EU Law

3.3.1 Article 107(1) of the Treaty on the Functioning of the EU

Article 107(1) of the Treaty on the Functioning of the EU includes four criteria that have to be met in order for a transaction to constitute state aid. The first criterion stresses that aid should be granted by a member state in order for it to be unallowable. As clarified from case law, the concept ‘aid’ refers to benefits directly from a member state or through a public or private body.⁹² The benefit should mean an economic advantage that the recipient would not have received under normal market conditions and the measure must entail an actual or potential use of public resources including loss to the State budget.⁹³ Only the effect of the action is relevant when considering whether the action means a benefit to the actor on the market. No consideration should therefore be taken regarding the reason or purpose of the action.⁹⁴

Municipalities, which are public bodies using public resources, perform land allocations that put developers in beneficial situations since they have the sole right to negotiate with municipalities about how the land should be exploited, and thereby have the exclusive chance of buying the land.⁹⁵ Today’s extent of performing direct allocations favours a small number of large developers, who have been dominating the market for several years, which means that few strong actors on the market benefit from the system.⁹⁶

There are indications that developers who receive land allocations through a direct procedure get to pay a lower price for the land than would have been the case if they received the land through a tender procedure. In a summary by Botrygg AB, in a pending case before the Stockholm Court of Administration, some comparisons are made between Stockholm municipality, who mainly perform direct allocations and nearby municipalities, who mainly perform tender allocations.⁹⁷ The summary demonstrates that there is a wider price difference between the price for transferring land after a direct allocation in Stockholm and the price (per square metres) for such apartments when sold to consumers, compared to the price for transferring land after a tender allocation in nearby municipalities and the price (per square metres) for such apartments when sold to consumers.⁹⁸ The same applies to leasing of land.⁹⁹ Thus, a piece of land in Stockholm municipality, where you can buy an apartment for a

⁹² See for example Cases C-72-73/91, *Sloman Neptun Schiffarts AG v Seebetriebsrat Bodo Ziesemer* (17 March 1993), para 19; C-189/91, *Kirsammer-Hack v Sidal* (30 November 1993), para 16; C-379/98 *Preussen Electra AG v Schleswig AG* (13 March 2001), para 58.

⁹³ Bacon (2013), p. 12.

⁹⁴ Case 173/73 *Italy v Commission* (2 July 1974), para. 13.

⁹⁵ Caesar, Kalbro & Lind (2013), p. 35.

⁹⁶ Caesar, Kalbro & Lind (2013), p. 49.

⁹⁷ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 26, p. 2.

⁹⁸ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 26, p. 2.

⁹⁹ See chapter 7.3 for suggestions for further research.

specific price per square metres, was transferred for a lower price through direct allocation than a piece of land in a nearby municipality, transferred through tender allocation, that provides apartments for the same price.

When analysing the result from the summary one should take into consideration that the summary is produced by the applicant of the case, who has an interest in presenting this result since it supports their case. Another aspect is that the summary only comprises a limited part of the municipalities in the country and there might be other relevant aspects, connected to these specific municipalities that should have been taken into consideration. Still, the summary indicates that there could be an economic advantage for developers that receive land through direct allocations.¹⁰⁰

It could be motivated to transfer land through direct allocations in Stockholm municipality to lower prices than in nearby municipalities, if the prices are to be considered as market prices. However, from reading the Commission's decision in the *Åre* case, the highest bid for a piece of land should principally be considered the market price,¹⁰¹ which is an argument that was not *per se* questioned by the Tribunal in the later judgement.¹⁰² Furthermore, in the Commission Notice it is stated that one can be sure that the land is transferred through market oriented conditions when it is made through a tender procedure.¹⁰³ Moreover, in a report by the Swedish Competition Authority it is stated that it is not possible to with certainty determine the market price for land without performing a tender allocation.¹⁰⁴ Thus, it is more likely that Stockholm municipality, when performing direct allocations, should set the price to the same price level as comparable pieces of lands in the nearby municipalities, in order to act market oriented. The economic advantages that developers seem to receive through direct allocations in Stockholm municipality are therefore probably not motivated since they should not be considered constituting the market prices. Taking this indication – that developers who receive land through direct allocations have an economic advantage – into consideration, performing direct allocations without restrictions could be problematic according to the first criterion in article 107(1) TFEU.

The second criterion when investigating unallowable state aid concerns that the aid should distort or threaten to distort competition. The aid should be considered distorting or threatening to distort competition when there is a risk that it improves the recipient's competition position in relation to other competitors. It is enough that the aid makes it

¹⁰⁰ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 26, p. 2.

¹⁰¹ State Aid (2006), paras. 18–20.

¹⁰² Case T-244/08, *COOP Nord v Commission* (13 December 2011).

¹⁰³ Commission Notice (2016), para. 84.

¹⁰⁴ Konkurrensverket, Rapport 2013:10, p. 73.

possible for an actor to maintain its position as a strong competitor on the market – it is not required that the aid means a larger market share for the actor. The aid that distorts or threatens to distort competition does not have to be significant or crucial, but it should not just be hypothetical.¹⁰⁵

As mentioned, today's extent of performing direct allocations favours a few large developers, who have been dominating the market for several years, which means few strong actors on the market benefit from the system.¹⁰⁶ The advantage that is presented by Botrygg AB in their summary is not hypothetical but presents an actual distortion of the competition.¹⁰⁷ Thus, the second criterion in article 107(1) TFEU could mean a problem when performing direct allocations without restrictions.

The third criterion concerns the requirement for the aid to favour certain undertakings or the producer of certain goods in order for the aid to constitute unallowable state aid. This means that the aid should relate to particular undertakings or to a particular type of product. In other words, situations of general fiscal and economic measures do not constitute state aid.¹⁰⁸ The measure of using direct allocations is related to a particular undertaking; it relates to situations of negotiations about how to exploit municipal-owned land before they are sold or leased to a developer. Therefore, aid through direct allocations should meet the third criterion in article 107(1) TFEU.¹⁰⁹

The fourth criterion concerns that the aid should affect trade between member states in order for it to be unallowable. Transfer of land from a municipality to a developer for exploitation affects the common market since foreign actors exist on the market, and the fourth criterion in article 107(1) TFEU is therefore met.¹¹⁰

Consequently, there are indications that direct allocations could mean economic advantages for developers and therefore constitute state aid. However, it is questionable whether direct allocations cause any economic benefits for developers because it is reasonably difficult to draw clear conclusions from comparisons between land that is transferred through tender allocation and land that is transferred through direct allocations, since all pieces of land are unique. But there are indications of economic advantages for developers who receive land through direct allocations, which ought to mean there is at least a risk for economic benefits.¹¹¹ Thus, performing direct allocations without restrictions could be considered to

¹⁰⁵ Commission Notice (2016), paras. 187–189.

¹⁰⁶ Caesar, Kalbro & Lind (2013), p. 49.

¹⁰⁷ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 26, p. 2.

¹⁰⁸ Bacon (2013), p. 12.

¹⁰⁹ Caesar, Kalbro & Lind (2013), pp. 35–36.

¹¹⁰ Konkurrensverket, Rapport 2013:10, p. 50.

¹¹¹ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 26, p. 2.

threaten to distort competition within the common market, which is enough in order to affirm unallowable state aid.¹¹² Considering the indication that direct allocations could threaten to distort competition in the light of the Commission's decision in the *Åre* case and the later judgement by the Tribunal could mean that performing direct allocations threatens to distort competition when there are no particular circumstances that make a sole developer suitable for exploiting the land.

3.3.2 State Aid as an Instrument in Case of Market Failure

State aid is not always unallowed, but can be an important instrument for governments to intervene in the economy of the state. It can create benefits for the national economy by, for example, improving efficiency when the market fails to deliver an optimal economic outcome. The market sometimes fails to provide the optimal level of goods and services and state aid can therefore be necessary in order to improve economic welfare.¹¹³ Many municipalities in Sweden are failing in the task of providing enough housing to the citizens, which could be considered a market failure where state intervention is justifiable.¹¹⁴ State aid through direct allocation could therefore be acceptable as a much faster procedure than performing tender allocations in order to solve the market failure of housing shortage more efficiently. Performing direct allocations is a way to attract serious developers that are willing to build new apartments, and thereby facilitate the housing shortages in municipalities, since the developers can afford setting off more resources to the project when they know they have the sole right to negotiate and later to buy the land.¹¹⁵ Performing direct allocations is also a way to economize municipality resources since the procedure is faster than a tender allocation and the municipality rarely has to find the developer and put effort in performing a detailed development plan.¹¹⁶

However, in order for state aid to be legally justifiable, it must fall within one of the exceptions in articles 107(2) and 107(3) TFEU. As concerns articles 107(2) and 107(3) TFEU, regarding situations when aid shall be or may be compatible with the common market, aid through direct allocations could only possibly fall under article 107(3)(c) TFEU according to the wording of the paragraphs. Article 107(3) TFEU concerns aid that is aimed to achieve an objective of common interest and 107(3)(c) focuses on the development of certain economic activities or of certain economic areas.¹¹⁷ The building of new housing for citizens

¹¹² Article 107(1) TFEU.

¹¹³ Bacon (2013), p. 7.

¹¹⁴ Bacon (2013), p. 8.

¹¹⁵ Konkurrensverket, Rapport 2013:10, p. 71.

¹¹⁶ Caesar, Kalbro & Lind (2013), pp. 85–86.

¹¹⁷ Bacon (2013), p. 14 & Article 107(3)(c) TFEU.

could be such common interest that falls under “certain economic area”. However, article 107(3)(c) TFEU only allows aid to promote the development of economic areas or activities in a given sector; the aid should not promote the position of a few actors operating in the sector. Performing direct allocations without restrictions can therefore not be legitimized under article 107(3)(c).¹¹⁸

3.4 Conclusions from Chapter 3

The conclusions that can be drawn from chapter 3 include that Swedish law allows for municipalities to perform direct allocations without restrictions. However, the judgement in the *Åre* case could mean that municipalities have to observe a higher bid that arrives in a direct procedure.

Furthermore, direct allocations could mean economic advantages for developers who receive them and might therefore be problematic in relation to article 107(1) TFEU. There are no exceptions that could make state aid legally justifiable in land allocation procedures.

¹¹⁸ C. Quigley Q. C., *European State Aid Law and Policy*, Second Edition, Portland: Hart Publishing (2009), p. 137.

4. Economic Analysis of Direct Allocations

Even though performing direct allocations without restrictions may seem questionable in relation to EU state aid regulations, it might be favourable by providing economic efficiency to the common market. As mentioned in section 1.6 above, economic efficiency can be defined in two different ways: 1. *Pareto efficiency*, which aims to increase economic welfare for at least one actor on the market without decreasing the economic welfare for the other actor(s) and: 2. *Kaldor-Hicks efficiency*, which aims to increase the total economic welfare meaning that the positive effects for one actor should outweigh the negative effects for the other actor(s) on the market. The *transaction costs theory* states in general that transaction costs combined with a lack of information affect the possibilities to reach economic efficiency.¹¹⁹ I will further in this section analyse whether performing direct allocations provides the market with more economic efficiency or whether tender allocation might provide more economic efficiency in some situations by using the transaction cost theory.

There are indications that municipalities lose financially when performing direct allocations, since the price for the land could have been higher by performing tender allocation.¹²⁰ Despite this, municipalities still mainly perform direct allocations, which means less transaction costs when distributing land to developers. The transaction costs when performing tender allocations are higher for municipalities since they, for example, have to establish how they want to exploit the land and then compare and analyse the offers.¹²¹ Thus, there are indications that the transaction costs are lower for municipalities when performing direct allocations and it is not clear that the possible higher price for the land, when performing tender allocations, would mean more economic welfare. Therefore, it is reasonable to suppose that municipalities decide to perform a plurality of direct allocations since they do not have all necessary information in order to foresee what a tender allocation would lead to, and they are not willing to find that out by taking the risk of having high transaction costs. This could be an opportunistic behaviour that might not generate the most economic welfare but might be favourable in the short run: municipalities make fast affairs with developers that they have a relationship to and trust in.¹²² Thus, direct allocations might lead to more economic welfare for municipalities, since the transaction costs are higher when performing tender allocations, but it is unclear whether the transaction costs outweigh the financial loss when transferring the land.

¹¹⁹ See chapter 1.6 above.

¹²⁰ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 26, p. 2.

¹²¹ Caesar, Kalbro & Lind (2013), pp. 85–86.

¹²² 'Opportunistic behaviour' is described in chapter 1.6 above.

When considering whether performing direct allocations means economic welfare for the counterpart it has to be considered that there is a big difference in how developers are affected by the system. As mentioned above, few big developers are favoured by the system since they dominate the land allocation market.¹²³ Thus, small developers are disadvantaged when municipalities perform direct allocation. However, the big developers, who receive direct allocations, have transaction costs when convincing municipalities that they are suitable developers: Those costs are called ‘influence costs’ and are difficult to calculate but might be significant.¹²⁴ Developers who do not receive direct allocations have obviously no transaction costs. However, performing direct allocations hinders small developers to enter the market and the plurality of developers does not receive as many allocations as they would like. Performing tender allocations also means transaction costs for developers, but they are probably less significant since municipalities have allocated resources to specify what they are looking for and how the selection will be made, which is therefore not for the developers to find out. Therefore, developers do not need to allocate as much resources to ‘influence costs’ and more developers will have the chance to access the market.¹²⁵ Accordingly, most developers on the market are disadvantaged by the unlimited use of direct allocations and the economic welfare for developers overall is therefore to be considered low.

Consequently, performing direct allocations without restrictions means low economic welfare for developers but could mean more economic welfare for municipalities. However, the potential welfare for municipalities is not significant and the system is therefore unlikely to provide the best possible solution for receiving economic efficiency. Since performing tender allocations seems to mean lower transactions costs for developers, I will analyse whether performing tender allocations instead of direct allocations is likely to lead to more *Kaldor-Hicks efficiency* or *Pareto efficiency*.

From reading the Commissions decision in the *Åre* case and the later judgement by the Tribunal, there seem to be situations where a direct allocation can be legally justified, even though another actor has arrived with a higher bid, since there are circumstances that make only one actor suitable for receiving the land allocation.¹²⁶ I will call these situations ‘*complex situations*’ compared to ‘*ordinary situations*’ where there are no specific circumstances, which means that more than one actor is suitable to receive the land allocation.

¹²³ Caesar, Kalbro & Lind (2013), p. 49.

¹²⁴ Caesar, Kalbro & Lind (2013), p. 85.

¹²⁵ Caesar, Kalbro & Lind (2013), pp. 85–86.

¹²⁶ State Aid (2006), pp. 5–7 & Case T-244/08, *COOP Nord v Commission* (13 December 2011).

Developers mostly initiate direct allocations.¹²⁷ However, if only tender allocations were allowed it would be less reasonable for developers to initiate projects since few developers would take the risk to allocate resources to influence costs if they were not quite sure of receiving the land. My economic analysis below – concerning only performing tender allocations and not direct allocations – will therefore assume that only municipalities initiate projects. It is, however, reasonable to believe that there would be developers who try to influence municipalities to perform a land allocation when they are interested in exploiting a land area. Even though the analysis will assume that only municipalities initiate projects it will still distinguish *complex situations* from *ordinary situations*.

When developers initiate land allocations today they often present well elaborated suggestions for how the land should be exploited, which means that municipalities have not come up with the idea concerning how the land should be exploited.¹²⁸ In those situations – when municipalities have few preferences concerning how land should be exploited – the land may still be distributed through tender allocations. There are, for example, possibilities for municipalities to perform tender competition and let developers present creative solutions for how to exploit the land.¹²⁹ In situations where municipalities, on the other hand, have preferences for how land should be exploited they may perform tender allocations with set criteria for what they expect from the developer. Both situations – when municipalities have preferences and when they have few preferences – may be included in *ordinary situations* when there are possibilities for many developers to arrive with bids.

It is likely that both municipalities and developers would gain in economic welfare status in *ordinary situations* if they were performed through tender allocations. The transaction costs for municipalities would probably increase compared to performance of direct allocations, but more developers would have the possibility to access the market and municipalities would therefore probably receive the highest possible price for the land: In *ordinary situations* more developers are suitable for exploiting the land, which should lead to more tenders and consequently a higher market price. The transaction costs for developers would probably decrease in *ordinary situations* since they would have less ‘influence costs’. Developers could meet high ‘influence costs’ if the number of tender competitions increased but there would probably still be enough tender allocations with set criteria that developers can choose to bid on. Using tender allocations in *ordinary situations* would therefore probably lead to *Kaldor-Hicks efficiency* but, if not so, at least to *Pareto efficiency*.

¹²⁷ Caesar, Kalbro & Lind (2013), p. 70.

¹²⁸ Caesar, Kalbro & Lind (2013), p. 70.

¹²⁹ Caesar, Kalbro & Lind (2013), p. 98.

In *complex situations* the economic welfare for municipalities would reasonably decrease if they performed more tender allocations. In *complex situations* more municipal resources would be required when performing tender allocations since there are specific circumstances that need to be specified before commencing the performance in order to avoid offers from unsuitable developers. Such specific circumstances could be, for example, like the ones in the *Åre* case where a development of the city planning meant that the municipality had to give the land allocation to a specific developer in order to fulfil the city planning development.¹³⁰ Municipalities would therefore meet high transaction costs in terms of preparation costs and costs for reviewing potential received offers that do not arise in direct procedures. Performing tender allocations could therefore mean unnecessary administrative work for municipalities since they would have to justify their choice of developer to a greater extent than in direct procedures. The transaction costs should also be higher for developers in *complex situations* since there is a risk that unsuitable developers arrive with offers, when the municipality in fact already has decided on a suitable developer. It would probably not open up for more developers to access the market since most of them do not meet the specific requirements.

Consequently, performing tender allocations in *complex situations* would probably mean decreased welfare for both developers and municipalities and could also mean less innovative solutions since there would be a lack of incentives for developers to allocate resources to develop innovative detailed development plans when they cannot be quite sure of receiving the land allocation. Performing tender allocations in *complex situations* would therefore not lead to more economic efficiency but rather to the opposite. However, the concept *complex situations* is very diffuse and there are probably situations that fall between *ordinary situations* and *complex situations*. Still, a suitable way to achieve more economic efficiency than today's situation could be to limit the use of direct allocations to *complex situations*.

¹³⁰ Länsrätten i Jämtlands Län, case 791-05 (24 May 2006), p. 2–3.

5. Judicial Analysis of the Land Allocation Framework

From chapter 3 and 4 I have found that it could be problematic, in relation to EU state aid regulations, to perform direct allocations in *ordinary situations* but it seems unproblematic in *complex situations*. There are also indications of more economic efficiency when performing direct allocations in *complex situations* compared to *ordinary situations* where it seems less economically efficient. When the focus in chapters 3 and 4 was to examine whether performing direct allocations could be problematic in relation to Swedish and EU law and to what extent municipalities should performing direct allocations, i.e. in what *situations* it could be justified – both legally and economically – the following chapter will focus on examining the framework for *how* to perform land allocations and whether that framework is sufficiently well designed in order to promote economic efficiency.

5.1 What Requirements Do Developers Meet in Land Allocation

Procedures?

In 2013 many developers complained about the lack of transparency in land allocation processes since each municipality had their own kind of system, which lead to unpredictability.¹³¹ These statements were made before Act 2014:899 was introduced and, despite there being no requirement to adopt land allocation policies, the developers felt the same unpredictability when doing business with municipalities that voluntarily provided land allocation policies: The unpredictability derived from the lack of uniformity.¹³² Furthermore, in 2013 the Swedish Competition Authority indicated that introducing a regulation that forces municipalities to adopt land allocation policies might not be enough to make the system efficient, since several municipalities that already had established policies did not comply with them.¹³³ After Act 2014:899 was introduced, developers still met diverse criteria from different municipalities in order to receive a land allocation.¹³⁴

Moreover, land allocation agreements between municipalities and developers contain both specific conditions, which are decided for each individual construction project, and general conditions, which must be stated in the municipality's land allocation policy.¹³⁵ The general conditions, however, can be divided into two categories: *formal* and *informal* conditions. The *formal* conditions concern, for example, the time limit for land allocations,

¹³¹ Caesar, Kalbro & Lind (2013), p. 73.

¹³² Konkurrensverket, Rapport 2013:10, p. 74–76.

¹³³ Konkurrensverket, Rapport 2013:10, p. 79.

¹³⁴ Konkurrensverket, Rapport 2015:5, p. 42–43.

¹³⁵ SFS 2014:899, *Lag om riktlinjer för kommunala markanvisningar*.

under what conditions a municipality may revoke a land allocation and possibilities for developers to transfer land allocations. *Informal* conditions, on the other hand, are not stated in the land allocation policy but are of implicit nature and may include conditions such as expectation to accept a poorer land area before having a chance to compete for the attractive ones. Consequently, in order to have a chance to receive a direct allocation, developers sometimes need to accept informal conditions, which are not stated in the land allocation policy.¹³⁶

5.2 Swedish Law

5.2.1 Act 2014:899

As mentioned above, the criteria and terms that developers have to meet in order to receive a land allocation varies between different municipalities. Act 2014:899 § 2 states that a municipality that performs land allocations shall adopt a land allocation policy. The paragraph further provides that a policy should contain: (1) Starting points and goals for transactions *or* plots of land areas for exploitation, (2) processing routines and basic conditions for land allocations and (3) principles for land pricing.¹³⁷

The first point concerns the allocation of costs in order to perform the detailed development plan and other circumstances that are important when reaching an agreement concerning transferring or leasing of land. The second point concerns how municipalities intend to deal with declarations of interest, how they make decisions to allocate land, what requirements that need to be met and something about the municipalities' assessment criteria. The last point requires municipalities to specify how they intend to make sure that no land is transferred below market price in accordance with EU state aid regulations.¹³⁸ Accordingly, the act states that municipalities are required to adopt land allocation policies and assigns what the policies should include. However it does not give any guidance concerning how municipalities should design their policies. The legislative proposal states that the general purpose of the law is to create transparency and increased intelligibility in the beginning of the process when land is being transferred from municipalities to developers.¹³⁹ As mentioned above, developers seek uniformity among municipalities in order to have more transparency. The act does not, however, include any regulation concerning a uniform land allocation process among municipalities. As mentioned in chapter 3, municipalities are obliged to

¹³⁶ Caesar, Kalbro & Lind (2013), pp. 39–40.

¹³⁷ SFS 2014:899, *Lag om riktlinjer för kommunala markanvisningar*.

¹³⁸ Prop. 2013/14:126, p. 287.

¹³⁹ Prop. 2013/14:126, p. 229.

perform land allocations in accordance with their policies but meet no sanctions if failing to do so. They should establish policies before performing any land allocation but the policy is no prerequisite to perform land allocations.¹⁴⁰

Consequently, the act provides plenty of room for municipalities to formulate their land allocation policies as far as they act within Swedish and EU law. However, municipalities meet no sanctions when they act against their own policies. Act 2014:899 should therefore be considered a loose framework for developers to act within when making land allocation businesses.

5.2.2 Legality Procedure

As mentioned in section 3.2.3, a decision to perform a land allocation with a certain developer can be challenged through a legality procedure in accordance with the Swedish Municipality Law (SFS 1991:900) chapter 10, which means that the decision cannot be changed but only revoked. The same applies for decision to adopt a land allocation policy. The appeal must be made no later than three weeks after the decision has been announced on the municipality's notice board.¹⁴¹ After that date, the policy cannot be challenge through a legality procedure but only decisions based on the policy. The possibilities to challenged land allocation decisions and policies through legality procedures will be further discussed in chapter 7.2.

5.3 EU Law

5.3.1 Commission Notice

In accordance with the Commission Notice concerning article 107(1) TFEU, there are two ways of transferring state-owned land to developers, in a way that is obviously market-oriented: either through a competitive, transparent, non-discriminatory and unconditional tender procedure, or by performing an independent expert valuation.¹⁴² Thus, the Commission Notice allows for municipalities to perform tender allocations and direct allocations but they can only be considered obviously market-oriented as long as they meet the criteria for the respective procedure.

Regarding tender allocation, the first requirement states that the procedure should be competitive, meaning that it should be possible for all interested, qualified developers to participate in the procedure. There are no indications that developers are excluded from participating in tender procedures in Swedish municipalities today. However, municipalities

¹⁴⁰ Prop. 2013/14:126, p. 287.

¹⁴¹ SFS 1991:900, *Kommunallag*, chapter 10 § 6.

¹⁴² Commission Notice (2016), paras. 89–92 & 103.

might have problems in meeting the other criteria in the Commission Notice in order to have marketable procedures. The second criterion from the Commission Notice – transparency – means that all interested tenders should be equally and duly informed about each phase in the process. The tenders should be provided with enough time to act, clear information about selection criteria and all necessary factors in the process.¹⁴³ As mentioned above, many developers consider the land allocation system in Sweden non-transparent since municipalities have adopted policies with requirements that differ from each other and do not always comply with their own policies, which makes it difficult for developers to foresee how to act in order to receive a land allocation.¹⁴⁴ Furthermore, the *informal* conditions, which are not stated in land allocation policies, also make it difficult to foresee land allocation processes and contributes to non-transparency.¹⁴⁵ Thus, the Swedish regulation (act 2014:899) does not oblige municipalities to act transparently in their land allocation processes since there are no reprisals when they do not comply with their own policies, which seems problematic for developers who experience unpredictability when applying for a land allocation. Transparency is a criterion formulated to hinder that land allocations are performed in a non-market-oriented way and the Swedish system may therefore be problematic in relation to EU state aid regulations.

The third criterion in the Commission Notice – non-discriminatory treatment – means that all tenders should be treated equally and that the selection and allocation criteria are objective.¹⁴⁶ Municipalities' use of *informal* conditions might be problematic when it comes to non-discriminatory treatment. One observed informal condition concerns that developers have to accept poorer land areas before having the chance to receive a more attractive one. The knowledge about informal conditions should probably be less established among new, inexperienced developers, who therefore could be discriminated in land allocation processes.¹⁴⁷ The fourth criterion – unconditional – means that receivers of land allocations should have full liberty to use the land for their own purpose in order for the procedure to be obviously market-oriented. The idea of land allocations is that municipalities develop a detailed development plan together with the developer of the land, meaning that the fourth criterion cannot be met in land allocation procedures.¹⁴⁸ However, tender allocation procedures could nonetheless be considered not market-oriented since the criteria in the Commission Notice only gives guidance concerning how to *be sure* transactions of state-

¹⁴³ Commission Notice (2016), para. 91.

¹⁴⁴ Konkurrensverket, Rapport 2013:10, p. 76.

¹⁴⁵ Caesar, Kalbro & Lind (2013), pp. 39–40.

¹⁴⁶ Commission Notice (2016), para. 92.

¹⁴⁷ Caesar, Kalbro & Lind (2013), p. 39.

¹⁴⁸ Caesar, Kalbro & Lind (2013), pp. 46–47.

owned property are market-oriented. It could possibly be a problem of competition law to perform tender allocations if the conditions established by the municipality are designed so that only a specific developer can meet them.

The alternative way (that should be used for direct allocations) of transferring state-owned land in a way that is obviously market-oriented requires municipalities to perform an independent expert valuation before the land is transferred. Independent expert valuations should be made before negotiations about transferring the land in order to establish the market price for the land, on the basis of generally accepted market indicators and valuation standards.¹⁴⁹ The criterion ‘independent’ is not further developed in the notice. However, the abrogated communication from 1997 provides more information regarding the criterion ‘independent’. The information is cited in section 2.2 above and states that Member State organs should preferably avoid making valuations of state-owned land that is aimed at being transferred to developers, in order to be sure the valuation is independent and, accordingly, that the transfer is market-oriented.¹⁵⁰ There is no previous research that has charted how municipalities perform independent expert valuations. I will therefore examine what room there is to perform independent expert valuations. With lack of further guidance in primary law and soft law, I have to look to case law and general principles of EU law. The following section of chapter 5.3 will therefore deal with case law and EU principles in order to examine the room for performing independent expert valuations.

5.3.2 Case Law Regarding ‘Independent’

In case T-253/12 the Tribunal considered the expert valuation independent since it was made (a) before the negotiations, (b) by a third party (c) that was independent in relation to both seller and buyer and (d) the valuer had good experience from real estate business. The Tribunal argued that the valuation was correctly performed since a consultant, who was considered not having a conflict of interests, made it and it was therefore evident that the expert valuation was independent.¹⁵¹ However, no demarcation was made of what should be considered an independent expert valuation since the court only argued that it was evident in this specific case that the expert valuation was independent. The only conclusion that can be drawn is that an expert valuation is to be considered independent when a third party, that has no conflict of interests, makes it.

There is no EU case law to be found concerning ‘independent expert valuation’ in situations where a body of the state has made the valuation. However, the Swedish case

¹⁴⁹ Commission Notice (2016), para. 103.

¹⁵⁰ Commission Communication (1997), p. 4.

¹⁵¹ Case T-253/12, *Hammar Nordic Plugg v Commission*, (not yet published), para. 44.

37589-10,¹⁵² ruled by the Stockholm Primary Court of Administration, deals with the concept 'independent expert valuation' when the valuation was made by a body of the state. The case is referred to by the defendant in the pending case no 22781-16 before the Stockholm Primary Court of Administration, where the defendant argues that it is established in case 37589-10 that Stockholm municipality itself performs expert valuations that are to be considered independent.¹⁵³ In Stockholm municipality the valuation unit, which performs expert valuations, and the project development unit, which makes decisions concerning land allocations, act under the same executive director and they are located on the same address (Fleminggatan 4) in Stockholm.¹⁵⁴

Despite these indications of expert valuations not being independent in Stockholm municipality, the court accepted the argument of the defendant, Stockholm city, in case 37589-10 and ruled that the expert valuation made by the valuation unit should be considered independent.¹⁵⁵ The argumentation was based on a report where the executive director for the development office stated that the valuation unit is organizationally separated from the project development unit.¹⁵⁶ That is, the executive director for both units claimed that the units are separated from each other and therefore the expert valuation, made by the valuation unit, should be considered independent.¹⁵⁷ Thus, the court accepted this argumentation with lack of better arguments from the applicant.

Since the Stockholm Primary Court of Administration, which is a court of first instance, ruled on the case 37589-10 it has no strong position as guiding case law, as would have been the case if the court of last instance ruled on the case. Furthermore, the Stockholm Primary Court of Administration has little obligation to investigate in cases like 37589-10 since it is of "positive character", meaning that it has no judicial negative consequences for the applicant, and the judgment that Stockholm municipality makes independent expert valuations could be considered to have limited value for other cases.¹⁵⁸ The only conclusion that can be drawn is that it was not proven by the applicant that Stockholm municipality fails in making proper expert valuations.

¹⁵² Förvaltningsrätten i Stockholm, case 37589-10 (16 June 2011).

¹⁵³ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 27 p. 2.3.4.

¹⁵⁴ Stockholms Stad, Fackförvaltningar, available at: http://www.stockholm.se/OmStockholm/Forvaltningarochbolag/Fackforvaltningar/#listrad_Exploateringskontoret (accessed at 26 June 2017).

¹⁵⁵ Förvaltningsrätten i Stockholm, case 37589-10 (16 June 2011), p. 23.

¹⁵⁶ Förvaltningsrätten i Stockholm, case 37589-10 (16 June 2011), p. 20.

¹⁵⁷ Stadsrevisionen, *Granskning av affärsmässigheten relaterat till ärende om försäljning av Sädesärlan 6*, Revisionsrapport DNR 420-062/2011, p. 12.

¹⁵⁸ A. Bohlin & W. Warnling-Nerep, *Förvaltningsrättens grunder*, Second Edition, Stockholm: Norstedts Juridik (2007), p. 109.

As mentioned above, the guidance from EU case law states that an expert valuation is independent when it is made before negotiations by a third party that has experience from real estate business and no conflict of interests in relation to the seller or the buyer.¹⁵⁹ There is no guidance concerning when an independent expert valuation is performed by a body of the state. Since there is also a lack of guidance in primary law, in Commission guidelines and in doctrine, it would be advisable to have guidance from the Court of Justice in this regard, as has been requested by the applicant in the pending case 22781-16.¹⁶⁰

In accordance with the abrogated Commission Communication from 1997, a state authority should only be considered independent when performing expert valuations when undue influence on their findings is effectively excluded. According to the wording of the guideline, it should be incumbent on the authority to preclude influence on their findings, which could be hard to guarantee with no further guidance from the Commission.¹⁶¹ In order to avoid legal concerns, it should be advisable to hire a third party to perform expert valuations.

5.3.3 EU Principles in Relation to Land Allocation Procedures

The *principle of equal treatment* includes that actors on the market should be treated equally. State undertakings must be foreseeable and not include too much margin of discretion, in order to not discriminate any actors on the market.¹⁶² As observed above, performing direct allocation means a wide margin of discretion for municipalities since they have the possibility to choose a proper receiver of land allocations without restrictions, as long as it is done at market price. Performing direct allocations could therefore be questionable in relation to the *principle of equal treatment*.

Furthermore, as mentioned above, the land allocation system includes informal conditions, making it hard for small developers to enter the market, which could lead to indirect discrimination even though the land allocation is performed through a tender procedure. The purpose of having informal conditions is perhaps not to discriminate developers but the effect could be discriminatory since there is a lack of foreseeability for small developers who have difficulty in fulfilling the informal conditions because of lack of information and market experience.¹⁶³

¹⁵⁹ Case T-253/12, *Hammar Nordic Plugg v Commission*, (not yet published), para. 44.

¹⁶⁰ Förvaltningsrätten i Stockholm, pending case 22781-16, case file 27, p. 15.

¹⁶¹ Commission Communication (1997), p. 2.

¹⁶² J. Hettne, *Rättsprinciper som styrmedel: Allmänna rättsprinciper i EU:s domstol*, Stockholm: Norstedts Juridik (2008), pp. 122–123.

¹⁶³ Caesar, Kalbro & Lind (2013), pp. 39–40.

Moreover, the *principle of legal certainty* also includes foreseeability.¹⁶⁴ In the case *Commission v France*, the Court of Justice found that France violated the principle of legal certainty when actors were required to apply for permission in order to buy stock shares from a state-owned company exceeding a certain value.¹⁶⁵ There were no clear, objective conditions concerning when an application was accepted or denied, i.e. there were no limits for the state's margin of discretion.¹⁶⁶ The case has some similarities with the Swedish land allocation system since it concerns transfer of state-owned property (stock shares and land areas) to individuals and the possibility to make discretionary decisions concerning the receiver of the property: The land allocation system includes possibilities to discretionary choose a developer when performing a direct procedure and to have informal conditions that favour certain developers, making the system non-transparent. The free movement of capital could therefore be endangered by legal uncertainty, when there is a lack of possibility for developers to foresee how to receive land allocations.

5.4 Conclusions from Chapter 5

The conclusions that can be drawn from chapter 5 include that the framework concerning how land allocations should be performed is quite loose, which could be competitively problematic. Today's performance of direct allocations could be problematic since there is no clear guidance concerning how to perform an independent expert valuation, meaning that municipalities themselves may perform expert valuations that might not be independent. The performance of tender allocations seems problematic in relation to the Commission Notice since they are non-transparent, could be discriminatory and are usually conditional.

Moreover, today's performance of tender allocations and direct allocations might be problematic in relation to the *principle of equal treatment* and the *principle of legal certainty* since the land allocation system contains informal conditions and a wide margin of discretion regarding the choice of developer, which could lead to discrimination and legal uncertainty concerning the free movement of capital.

¹⁶⁴ Hettne (2008), p. 127.

¹⁶⁵ Case C-483/99, *Commission v France* (4 June 2002), para. 50.

¹⁶⁶ Case C-483/99, *Commission v France* (4 June 2002), para. 51.

6. Economic Analysis of the Land Allocation Framework

Despite the fact that the framework, concerning how land allocations should be performed, is quite loose and could mean competitive problems, the framework may anyhow mean economic efficiency. I will therefore examine whether the loose framework contributes to economic efficiency, or whether a stricter framework would make the land allocation system more efficient.

As established in chapter 4, the transaction costs for municipalities are high when performing tender allocations compared to the lower transaction costs they meet when performing direct allocations. Developers, on the other hand, have higher transaction costs when performing direct allocations compared to the lower transaction costs they meet in a tender procedure. In this following section I am going to analyse the level of economic efficiency with today's loose framework concerning performance of land allocations, compared to the level of economic efficiency that would be the case with a stricter framework.

Based on the potential competition problems with today's loose framework that I have identified earlier in this chapter I will presume that a stricter framework concerning performance of tender allocations would mean that it is prohibited to have informal conditions and that municipalities are obliged to comply with their land allocation policies in order for the land allocation to be valid. Based on the potential competition problems concerning today's performance of direct allocation, a stricter framework would mean that municipalities are obliged to outsource the expert valuation to a third party. In the following section I am going to analyse the level of transaction costs that municipalities and developers meet with today's loose framework versus the level of transaction costs that they could meet with a stricter framework. In other words, I will analyse how the two different scenarios contribute to economic welfare.¹⁶⁷

The transaction costs when performing tender allocations are relatively high for municipalities compared to the transactions costs they meet in direct procedures since they, for example, have to establish how they want to exploit the land and then compare and analyse the offers.¹⁶⁸ It is reasonable to believe that the transaction costs would be higher for municipalities if they were hindered to have informal conditions and were obliged to follow their land allocation policies, since that would mean that they have to allocate more resources to formulate very precise land allocation policies and conditions concerning each project.

¹⁶⁷ 'Economic welfare' is described in chapter 1.6.

¹⁶⁸ Caesar, Kalbro & Lind (2013), pp. 85–86.

Performing tender allocations means transaction costs for developers too, but they are probably less significant since municipalities already have allocated resources to specify what they are looking for and how the selection will be made, which is therefore not for the developers to find out.¹⁶⁹ It is reasonable to believe that the transaction costs would be lower for developers if the framework was stricter, since it would be clearer how to receive a land allocation and more developers would have access to the market without the informal conditions that could be discriminatory to small developers.¹⁷⁰

It is difficult to tell whether the increased economic welfare for developers would outweigh the decreased economic welfare for municipalities if the framework, when performing tender allocations, was stricter. Today's transaction costs for developers in tender procedures are relatively low compared to the high transaction costs that municipalities meet. A stricter framework when performing tender allocations could therefore mean that the actors would move further away from each other in economic welfare. Having a stricter framework for tender allocations could therefore lead to *Kaldor-Hicks efficiency*,¹⁷¹ but it is also reasonable to believe that the economic welfare would be unchanged.

Performing direct allocation means low transaction costs for municipalities compared to the transaction costs they meet when performing tender allocations and the transaction costs developers meet in a direct procedure.¹⁷² It is reasonable to believe that the transaction costs could be higher if municipalities were obliged to outsource the expert valuations to a third party since hiring a third party to do the job is more expensive than doing it yourself. However there is no previous research concerning potential differences in the results when a valuation is made by a third party compared to when it is made by the municipality, which makes it difficult to fully take this aspect into consideration.

Developers who receive direct allocations have transaction costs, in terms of 'influence costs', when convincing municipalities that they are suitable developers. Influence costs are difficult to calculate but might be significant.¹⁷³ Furthermore, the economic welfare is low for developers who fail in receiving any direct allocations because they do not have access to the market.¹⁷⁴ It is reasonable to believe that the transaction costs could be unchanged for developers if municipalities had to outsource expert valuations to a third party. Developers would still have to allocate resources on influence costs and the market access would not increase if third parties performed expert valuations.

¹⁶⁹ Caesar, Kalbro & Lind (2013), pp. 85–86.

¹⁷⁰ Caesar, Kalbro & Lind (2013), pp. 39–40.

¹⁷¹ *Kaldor-Hicks efficiency* is described in chapter 1.6.

¹⁷² Caesar, Kalbro & Lind (2013), p. 85.

¹⁷³ Caesar, Kalbro & Lind (2013), p. 85.

¹⁷⁴ Caesar, Kalbro & Lind (2013), pp. 66–67.

Since a stricter framework concerning performance of direct allocations probably would mean less economic welfare to municipalities and unchanged economic welfare to developers, compared to having today's loose framework, it is reasonable to believe that today's system provides more economic efficiency than a stricter framework would do.

7. Discussion

7.1 Results

The essential results from chapters 3–6 will be presented jointly in this section and further discussed below in section 7.2.

Today's system, where municipalities perform direct allocations without restrictions, could be problematic since there are indications that it distorts competition by favouring large established developers and hinders small developers to access the market. Receiving land through a direct allocation could mean an economic advantage for developers compared to developers who receive land through a tender procedure since there are indications that the land-price is set lower when the land is transferred through a direct procedure.

Performing tender allocations, instead of direct allocations, in *ordinary situations* seems more economically efficient since it provides more economic welfare to at least developers but probably to municipalities as well. Performing tender allocations in *complex situations*, on the other hand, seems less economically efficient since it provides less economic welfare to both developers and municipalities.

Today's framework concerning performance of land allocations is loose, which could mean problems of competition law. The framework allows for municipalities to have informal conditions and a wide margin of discretion when choosing a suitable developer, as well as allowing municipalities to perform expert valuations themselves in a way that could be questioned as being non-independent. Overall, the framework seems non-transparent and discriminatory, which could be problematic in relation to the *principle of equal treatment* and the *principle of legal certainty*.

Having a stricter framework concerning performance of land allocations would probably lead to less economic efficiency in direct procedures: Developers would have unchanged economic welfare when still having influence costs and municipalities would meet decreased economic welfare when having to outsource expert valuations to third parties. Concerning tender allocations, a stricter framework would lead to increased economic welfare for developers and decreased economic welfare for municipalities. It is, however, difficult to tell whether the positive aspect for developers would outweigh the negative aspect for municipalities.

7.2 Concluding Discussion

As mentioned in section 1.6 (Method and theory), provisions of EU law should always be interpreted in the light of the EU law as a whole, in accordance with the *CILFIT* case. Since the overall purpose of EU state aid regulations is to have economic efficiency within the common market, the aim of the land allocation system cannot solely include that it should be unproblematic in relation to EU state aid regulations – it should also be the most economically effective system. As examined in this thesis, today's system of performing land allocations could be problematic in relation to competition law and does not mean economic efficiency in all situations. This section will therefore discuss what changes may be needed in order for the system to comply with EU state aid regulations while also being economically efficient. I will commence by analysing the possibilities to appeal land allocation decisions that might contradict EU state aid regulations.

The transaction costs are high when municipalities perform tender allocations but it seems economically efficient in *complex situations* to let municipalities act as they are doing today even though it might be problematic from a competition law point of view. Today municipalities mainly perform direct allocations and a court is to decide on the case when disputes appear. Act 2014:899 is therefore to be viewed as a *liability rule* and, in accordance with the *transaction costs theory*, it is suitable to have such a rule when the transaction costs are high since having a *property rule* instead would mean an unwelcome market hindrance.¹⁷⁵

However, a land allocation decision or policy can only be challenged through a legality procedure.¹⁷⁶ In accordance with the principle of *sincere cooperation* the EU and the member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Therefore, Sweden has to efficiently undertake measures in order to fulfil their obligations concerning the prevention of state aid. It is questionable whether Sweden fulfils the requirement of *sincere cooperation* when a legality procedure functions as the tool to make sure there are no elements of state aid in land allocation procedures. The legality procedure means that private actors on the market are expected to appeal in court when they believe a land allocation is unlawfully performed, without the possibility of having the decision changed to their advantage. Thus, a legality procedure means little incitement to appeal when municipalities unjustly perform land allocations. When doing research for this thesis I had difficulties in finding relevant case law concerning land allocation procedures, which could mean that few cases are brought to court because of the lack of incitement to

¹⁷⁵ Bastidas Venegas (2014), p. 189–190.

¹⁷⁶ Except from situations when municipalities decide to report their actions to the Commission in accordance with article 108(3) TFEU.

appeal. Perhaps another form of procedure to handle doubtful situations of land allocations would lead to more decisions on land allocations being appealed in court. It could, for example, be suitable to have a procedure where a challenged decision could be changed in favour for the appellant.

Since the current possibility to challenge a decision does not seem efficient, it might also be necessary to make some adjustments to Act 2014:899 in order to make sure that there are no elements of state aid in land allocation procedures. The Swedish Competition Authority suggests that there should be a requirement for municipalities to perform a certain portion of land allocations as tender procedures. However, as examined in this thesis, it seems economically inefficient to perform tender allocations in *complex situations*, which therefore might be a relevant factor to take into consideration if adjusting Act 2014:899. Thus, it could be favourable to have a regulation that only allows for direct allocations in *complex situations*. However, it could be difficult to formulate such a regulation since it might be hard to specify what situations that should be included in the concept *complex situations*, i.e. in what situations there are circumstances that make only one actor suitable for receiving the land allocation. It should fall on municipalities to make that consideration but that would probably mean considerable amounts administrative work for them and have economically negative effects. Nonetheless it could be justifiable to make such adjustment in order to comply with EU state aid regulations.

Today's loose framework concerning how to perform land allocations seems more economically efficient than having a stricter framework in situations of direct allocations, while the prognosis is uncertain in situations of tender allocations. However, the loose framework seems to cause some problems of competition law and the economic gains of having a loose framework might therefore not be motivated. Today's inefficient system of challenging land allocation decisions means that municipalities may continue with problematic land allocation procedures with low risk of being challenged in court. As mentioned above, I find it important to have a more effective system of challenging land allocation procedure than today's legality procedure. If the challenging system is improved, it is necessary to also have a stricter framework that provides municipalities with adequate guidance in how to perform land allocations without the risk of breaching competition law and having their decisions challenged in court.

In conclusion, Sweden does not have an efficient system to prevent illegal state aid in land allocation procedures. Suggestions for improvement include stronger incitements for actors to challenge land allocation decisions in court and clearer regulation regarding what

situations that allows for municipalities to perform direct allocations and a stricter framework regarding how to perform land allocations to avoid elements of illegal state aid.

7.3 Suggestions for Further Research

Some land allocations result in leasing of municipal-owned land, sometimes aimed for building rental apartments, which is a way for municipalities to subsidize land to make it more attractive for developers.¹⁷⁷ Since developers are almost unlimited in deciding rental levels for newly built apartments,¹⁷⁸ it would be interesting to examine whether leasing of land for construction of apartments is to be considered as a transfer of value from the municipality to the developer. And if so, whether the system of performing land allocations aimed at leasing of land is compatible with EU state aid regulations when it is made below market price. This thesis does not include research on leasing of land but I consider the subject of great interest for further studies on land allocations.

Regarding the lack of previous research concerning expert valuations and land prices when land is transferred after tender allocations compared to when transferred after direct allocations,¹⁷⁹ I consider those subjects interesting for further research in studies of real estate and economics.

¹⁷⁷ Konkurrensverket, Rapport 2015:5, p. 72.

¹⁷⁸ L. Holmquist & R. Thomsson, Hyreslagen, Zeteo (2016), comment to 55c.

¹⁷⁹ As mentioned in chapter 1.5.

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