

23 November 2016

To: The Chamber of Commerce and Industry of Southern Sweden
Att: Per Tryding

MEMO

Regarding the introduction of an obligation on transport operators to carry out identity controls on passengers travelling to Sweden

The present memo concerns the introduction of an obligation on transport operators to carry out identity controls on passengers travelling to Sweden and explains why this obligation is contrary to the Schengen Code, the Dublin III Regulation, the Geneva Convention, EU competition law, the EU Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1 Background

On 18 December 2015, the Swedish Government promulgated an Act on special measures in the event of a serious threat to public policy or the internal security in the country (hereinafter “the Act”)¹, adopted by the Parliament the day before. Under the Act, the Swedish Government is empowered to require operators of buses, trains and passenger ships, under penalty of administrative fines, to carry out identity controls on *all* their passengers travelling to Sweden from another Schengen country.

The same day, on the 18 December, the Government issued an Ordinance on certain identity controls in the event of a serious threat to public policy or the internal security in the country (hereinafter “the Ordinance”).²

The Act entered into force on 21 December 2015 and will expire on 21 December 2018. The Ordinance entered into force on 4 January 2016 and was to be in force for six months. The Ordinance was then extended for four months and it has recently been extended yet again until 11 February 2017.

¹ Lag om särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet, SFS 2015:1073.

² Förordning om vissa identitetskontroller vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet, SFS 2015:1074.

ADVOKATFIRMAN VINGE KB

ÖSTERGATAN 30
 BOX 4255
 SE-203 13 MALMÖ
 SWEDEN

TEL +46 (0)10 614 55 00
 FAX +46 (0)10 614 55 01
www.vinge.se

The new Act and the Ordinance have major implications especially transport operators active in the Öresund region and for private persons who daily commute to work from Sweden to Denmark or vice versa.

In conjunction with the enactment the Act and Ordinance above, Sweden on 11 November 2015 reintroduced border controls pursuant to Article 25 of the Schengen Border Code.³ The Schengen Border Code provides that countries in the passport-free Schengen zone can only reintroduce temporary border controls when there is a serious threat to public policy or internal security in a member state. In May 2016 the EU granted a request from Sweden to extend the measures by six months. The extension was due to expire on November 11th, but the European Commission proposed on 25 October 2016 that a recommendation be adopted by the European Council to prolong the border controls in Sweden as well as those implemented in Austria, Germany, Denmark and Norway, where controls also take place – according to the Council Recommendation of 12 May – for a period of a further three months.

2 A Summary

Sweden infringes the Schengen Border Code by adopting the Act and the Ordinance; by not ensuring that Sweden will respect the procedural requirements set out in the Schengen Border Code; by requiring the border controls to be carried out by the personnel of the carriers instead of by specially trained public officials; by imposing carriers' liability even though there is no legal basis for such a liability in the Schengen Code in relation to border controls at internal borders; and by not ensuring that the Act is proportionate to the alleged threat.

Moreover, by adopting the Act and the Ordinance and thereby forcing carriers to refuse passengers who do not have correct identity papers, the Government hinders refugees and stateless persons from reaching the Swedish border and they are thereby prevented from exercising their right to submit an application for asylum. Sweden thereby circumvents its obligations under the Geneva Convention, the Dublin III Regulation and the Schengen Border Code.

Furthermore, the measures will lead to inequality of opportunity between transport operators and the Öresund Consortium, and therefore lead to a distortion of competition in violation of Article 4(3) TFEU and Article 106(1) in conjunction with Article 102 TFEU. This effect is strengthened since the transport operators are forced to carry out the identity controls in Denmark before departure while the identity controls on the Öresund Bridge, if any, will be carried out by the Swedish police in Sweden after the passenger has crossed the Öresund Bridge. The Öresund Consortium is owned to 50 % by the Swedish State and it is the sole operator with regard to trains crossing the Öresund and by far has the biggest market shares in terms of number of buses, lorries and cars crossing the Öresund.

In addition, the Act and the Ordinance constitute a restriction on the freedom to provide services contrary to Article 56 TFEU, since the measures adopted on the basis of the

³ Regulation (EU) of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders.

Act will require, and the Ordinance does require, the transport operators to carry out identity controls on all its passengers travelling to Sweden. This restriction cannot be justified as it is neither appropriate nor necessary in order to fulfil the objective which it pursues.

Moreover, the Act and the Ordinance restrict the train, bus and passenger ship operators' freedom to conduct a business and their right to property, in violation of Articles 16 and 17 of the EU Charter of Fundamental Rights. Since the Act is contrary to the principle of proportionality, it follows from Article 52(1) of the Charter that the exercise of these rights and freedoms may not be limited.

Finally, the Act and the Ordinance contravene the free movement of persons pursuant to Articles 20, 21 and 77 in the TFEU, Article 45 of the EU Charter of Fundamental Rights and the right to liberty of movement and the right of a citizen to enter the territory of the state of which he is a national according to Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

To conclude, the recently adopted Act and the Ordinance are contrary to the Schengen Border Code, the Dublin III Regulation, the Geneva Convention, EU competition law, the free movement of services and persons in the TFEU, EU Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms

3 Sweden has failed to comply with EU law

In essence, Sweden has failed to comply with EU law.

- (a) By requiring operators of trains, buses and passenger ships to carry out the border controls instead of specially trained public officials, Sweden has failed to comply with its obligations under Article 32 to apply the relevant provisions of Title II of the Schengen Border Code when reintroducing border controls at internal borders.
- (b) By introducing border controls that prevent refugees and stateless persons from exercising their right to seek asylum under the Geneva Convention and the Dublin III Regulation, Sweden has failed to comply with its obligations under Article 3(1) of the Dublin III Regulation and the Geneva Convention.
- (c) By adopting measures that will lead to inequality of opportunity between economic operators and therefore distort competition, Sweden has failed to comply with its obligations under Article 4(3) TEU and Article 106(1) TFEU in conjunction with Article 102 TFEU.
- (d) By requiring operators of trains, buses and passenger ships, under penalty of administrative fines, to carry out identity controls on *all* their passengers travelling to Sweden and thereby restricting the freedom to provide services, without the measures being capable of being justified since they are neither suitable nor necessary for the attainment of their objective, Sweden has failed to comply with its obligations under Article 56 TFEU.

- (e) By requiring operators of trains, buses and passenger ships, under penalty of administrative fines, to carry out identity controls on *all* their passengers travelling to Sweden, Sweden limits the carriers' freedom to conduct a business and their right to property, without those limitations respecting the principle of proportionality, and thus has failed to comply with its obligations under Article 16, 17 and 52(1) of the EU Charter of Fundamental Rights.
- (f) Finally, by requiring operators of trains, buses and passenger ships, to carry out identity controls on *all* their passengers travelling to Sweden, Sweden contravenes the free movement of persons pursuant to Articles 20, 21 and 77 in the TFEU, Article 45 of the EU Charter of Fundamental Rights and the right to liberty of movement and the right of a citizen to enter the territory of the state of which he is a national according to Articles 2 and 3.1 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3.1 The Swedish Act on special measures in the event of a serious threat to public policy or the internal security in the country

On 18 December 2015, the Swedish Government promulgated an Act on special measures in the event of a serious threat to public policy or the internal security in the country, adopted by the Parliament the day before.⁴

Section 2 of the Act provides that if there is a serious threat to public policy or the internal security in the country, the Government may adopt the measures set out in the following Sections with the aim of maintaining law and order or safeguarding national security. It follows from the Bill that the provision empowers the Government to decide that a serious threat exists.

Section 3 of the Act empowers the Government, or the authority designated by the Government, to decide on the introduction of identity controls on transports by bus, train or passenger ships to Sweden from another country. Transports by car and by lorries are thus not covered, nor are air transports.

It follows from the Government Bill that the identity controls are to be carried out by the carriers, under penalty of an administrative fine. The carriers will have to be able to prove to the authorities that they have carried out controls on all passengers and that they do not bring any passengers into the country who do not have valid identity documents. Based on the information available and to the best of the Complainant's understanding, the controls will have to be carried out outside of Sweden.⁵ As regards passengers in cars and lorries travelling to Sweden by passenger ship, the ship operators will be responsible for carrying out controls. The Act does not provide for a similar liability on operators of fixed links such as bridges.

⁴ The Act was proposed by Government's Bill 2015/16:67 (Prop. 2015/16:67 *Särskilda åtgärder vid fara för den allmänna ordningen eller den inre säkerheten i landet*).

⁵ This has been confirmed since the entry into force of the Ordinance.

Section 4 of the Act empowers the Government to issue regulations regarding control and monitoring of the measures adopted on the basis of Section 3 and regarding administrative fines for infringements of those measures.

Section 5 of the Act provides that the measures adopted on the basis of Section 3 may apply for a maximum of six months.

3.2 Ordinance on certain identity controls in the event of a serious threat to public policy or the internal security in the country

On the basis of the Act, the Government issued an Ordinance on 18 December 2015 regarding identity controls in the event of a serious threat to public policy or the internal security in the country. The Government held a press conference and issued a press memorandum briefly outlining the main elements of the Ordinance.⁶ The Ordinance provides that carriers shall verify that all passengers they transport to Sweden from Denmark by train, bus or passenger ships have a valid identification document with a photo.

An operator that cannot show that he has fulfilled the obligations to carry out identity controls will have to pay an administrative fine of SEK 50 000 per transport. The Swedish police authority will be responsible for verifying that carriers carry out the identity controls. On request, the Swedish Customs and the Swedish Coast Guard shall assist the police. The Swedish police may issue regulations on control of identification documents.

The Swedish Transport Agency may issue regulations on the administrative fines.

At the press conference the Minister of Infrastructure stated that carriers will have to decide how to implement the identity controls in practice. The Government did not set out any detailed requirements in that respect. The Minister of Infrastructure also stated that the aim of the Ordinance was to reduce the number of persons seeking asylum in Sweden.

4 Sweden is infringing its obligations under the Schengen *acquis*

The legal basis for the Swedish Act and the Ordinance adopted thereunder is the so-called Schengen Borders Code. According to Article 4, when applying the Regulation, the Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union (hereinafter the “Charter”).

In the Bill however, the Government’s analysis of the compatibility with EU law is limited to three sentences, which shows the insufficiency of the analysis:

The EU legal framework respects that Member States must have a margin under the Treaty to take the necessary measures to maintain law and order and safeguard national security. The EU legal framework does not therefore constitute an obstacle to such an act of empowerment as

⁶ Näringsdepartementets promemoria *Information om förordning om visa identitetskontroller vid fara för den allmänna ordningen eller den inre säkerheten i landet* 18 December 2015.

currently proposed. If the Government adopts regulations on the basis of such an act, EU law must of course be respected.⁷

4.1 The Act and the Ordinance infringe the Schengen Code

Schengen Border Code sets out the EU general framework regarding border controls.

4.1.1 *Duration of the temporary measures under Article 23 and 24 – Foreseeable cases*

According to Article 25.1 of the Schengen Code, where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, a Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border controls at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

Paragraph 3 provides that if the serious threat to public policy or internal security in the Member State concerned persists beyond the 30 days, that Member State may prolong border controls at its internal borders, taking account of the criteria referred to in Article 26 and in accordance with Article 27, on the same grounds as those referred to in paragraph 1 of this Article and, taking into account any new elements, for renewable periods of up to 30 days.

Under paragraph 4, the total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of the Article, shall not exceed six months. The total period may nevertheless, in exceptional circumstances putting the overall functioning of the area without internal border control at risk, be extended to a maximum period of two years, in accordance with the procedure set out in Article 29.

It is thus clear from the Schengen Codex that measures reintroducing border controls may only last 30 days. If the serious threat persists they may be prolonged 30 days at the time, but the maximum duration is, in principle, limited to six months.

The Swedish Act, in its Section 5, provides that the measures requiring the introduction of identity controls may remain in force up to a maximum of 6 months. It further provides in its Section 6 that the new measures may be adopted after the expiration of the previous measures. However, the Schengen Code does not provide for a possibility of again reintroducing border controls at internal borders, possibly for another period of 6 months.

In this respect, it is important to note that the Act itself does not reintroduce border controls. It only empowers the Government, or the authority designated by the Government, to adopt measures reintroducing certain border controls. However, the

⁷ Government Bill 2015/16:67 *Särskilda åtgärder vid fara för den allmänna ordningen eller den inre säkerheten i landet*, page 10.

legislative text provides for a possibility to adopt measures covering periods of up to six months without any mentioning of the limitations set out in the Schengen Border Code. This is clearly contrary to Article 25 of the Schengen Code which expressly only provides for a possibility to enact measures with a duration of 30 days at the time and with a *total* maximum of six months. The possibility to enact measures reintroducing border controls for as long as six months is thus clearly contrary to the Schengen Border Code.

Furthermore, the explicit possibility of adopting new measures after the expiry of the six months period is a clear circumvention of the rules in Articles 25(4) and 29 of the Schengen Code, which requires a recommendation of the Council, on a proposal of the Commission, in order for measures to be prolonged for a period exceeding six months.

As regards the Ordinance, it reintroduces border control for a period of six months which period has been extended to 11 February 2017, which is for more than one year. This is clearly an infringement of the Schengen Code.

It follows from the above that neither the Swedish Act, nor the Ordinance complies with the limitations on duration of measures as provided for in the Schengen Code.

4.1.2 *The border controls are not to be carried out by public officials*

In case a Member State decides to reintroduce border controls at internal borders, Article 32 of the Schengen Code provides that the relevant provisions of Title II shall apply *mutatis mutandis*.

Title II concerns the external borders and Articles 5 to 21 provide for the conduct of border controls. According to Article 15, the border controls must be carried out by border guards in accordance with the provisions of the Schengen Code and with national law. Article 2(14) defines a border guard as “any public official assigned, in accordance with national law, to a border crossing point or along the border or the immediate vicinity of that border who carries out, in accordance with this Regulation and national law, border control tasks”.

Furthermore, Member States shall ensure that the border guards are specialised and properly trained professionals. Training curricula shall include specialised training for detecting and dealing with situations involving vulnerable persons, such as unaccompanied minors and victims of trafficking.

Hence, under the Schengen Border Code, border controls must be carried out by specially trained public officials.

It follows from the Government Bill⁸ and it is explicitly set out in the Ordinance that the carriers are to be responsible for carrying out the identity controls. The identity controls imposed on the carriers by the decision of the Swedish Government are for all intents and purposes carried out at the Swedish border and in response exclusively to an

⁸ Government Bill 2015/16:67 *Särskilda åtgärder vid fara för den allmänna ordningen eller den inre säkerheten i landet*, page 16.

intention to cross that border. They are carried out solely to ensure that the persons crossing the border may be authorised to enter the territory of Sweden.

However, the personnel of bus companies, train operators and passenger ships are not public officials, nor are they specially trained for carrying out border controls.

In this context, one may recall that the Workplace Health and Safety Directive⁹ impose a number of obligations on the employer. Article 12 sets out that the employer must ensure that each worker receives adequate safety and health training, in particular in the form of information and instructions specific to his workstation or job (this requirement also relates to workers from outside undertakings or establishments that the employer engages). Furthermore, the employer shall ensure that an assessment has been made of the risks to safety and health at work, including those facing groups of workers exposed to particular risks and decide on the protective measures to be taken and, if necessary, the protective equipment to be used (Article 9). All these obligations will of course apply also to the new tasks that the carriers will have to impose on their personnel in relation to the border controls for which they will be responsible.

After a request from the Swedish Police, the Swedish Customs assist the police in carrying out the presently applicable Swedish measures temporarily reintroducing border control at internal borders (adopted under Article 25 of the Schengen Code).¹⁰ The police and customs officers thus work side by side when carrying out identity controls and they also share premises. The personnel of the carriers having to carry out the identity controls will have no such support and help from neither the Swedish police nor the Swedish Customs.

It is also interesting to note that, according to an article in the Swedish newspaper *Sydsvenska Dagbladet*, published on 14 December 2015, the personnel of the Swedish Customs assisting the police in carrying out the identity controls have requested the right to carry arms in order to be able to protect themselves.¹¹ This is also confirmed by a request from the Committee of Safety representatives at the Swedish Customs addressed to the management.¹²

Consequently, the Swedish Act and the Ordinance fail to comply with the obligation to ascertain that border controls are carried out by specially trained public officials.

4.1.3 *No carriers' liability possible in case of temporary reintroduction of border control at internal borders*

Existing rules on carriers' liability are only applicable in relation to third countries. Article 26(2) of the Schengen Convention provides that Member States undertake to impose penalties on carriers who transport aliens who do not possess the necessary travel documents by air or sea from a third State to their territories.

⁹ Council Directive 83/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183/1).

¹⁰ Swedish Police Cooperation With the Swedish Customs.

¹¹ *Sydsvenska Dagbladet* 14 December 2015, <http://www.sydsvenskan.se/sverige/tullanstallda-vill-fa-bara-skjutvapen/>, accessed 17 December 2015.

¹² Swedish Customs Committee of Safety Representatives.

According to Article 32 of the Schengen Border Code, the provisions applicable in the case of a reintroduction of border control at internal borders are those set out in Title II of the Code. Title II does not provide for carriers' liability for carrying out identity controls. There is thus no legal basis for the adoption by a Member State of measures imposing an obligation on carriers to carry out identity controls at internal borders and even less so under penalty of administrative fines.

In a recent answer to a question from a Member of the European Parliament, the Commission confirms that carriers cannot be required to carry out identity controls on passengers crossing internal borders. In very clear terms, the Commission held that "Extending existing rules on carrier's liability to intra-Schengen flights would allow Member States to impose an obligation on carriers to carry out systematic checks in the territory of another Member State on crossing the internal borders similar to those which only travelers on flights crossing external borders of the Schengen area are subject to; this would be incompatible with Title III of the Schengen Borders Code".¹³

Recent infringement proceedings initiated by the Commission also confirms this clearly. In a case concerning the Czech Republic, the Commission in a reasoned opinion formally requested the Czech Republic to amend its legislation to ensure that penalties were not imposed on carriers when transporting foreign nationals without the relevant travel documents on intra-Schengen flights.¹⁴

Hence, by empowering the Government, or an authority designated by the Government, to adopt measures requiring carriers to carry out identity controls, under penalty of an administrative fine, the Act is incompatible with the Schengen Code, since there is no legal basis for such measures. A fortiori, the Ordinance, not only setting out that such controls shall be carried out but also providing for an administrative fine of SEK 50 000, is also contrary to the Schengen Code.

In this context, it should be underlined that it is contrary to the general principle of legal certainty to impose an obligation under penalty of a fine on a physical or legal person by using another legal basis by way of analogy.

4.1.4 *The measure is disproportionate*

Article 25.1 of the Schengen Code requires measures temporary reintroducing border control at internal borders to be proportionate to the threat.

As has been presented above Sweden reintroduced internal border control under the Schengen Border Code in conjunction with the enactment of the Act and Ordinance. Pursuant to the Schengen Border Code Swedish Customs and Police conduct border checks on persons at the Swedish Border at the Öresund Bridge and on board trains at the Hyllie train station which is the first stop of the trains from Denmark to Sweden after the Öresund Bridge. It is thus clear that an act empowering the Government, or the authority designated by the Government, to adopt measures requiring carriers, under penalty of an administrative fine, to carry out identity controls on *all* passengers (and to

¹³ Commission's answer of 29 July 2015 to Question for written answer by MEP Primdahl Vistisen, "Liability of air carriers in the Schengen Area", Ref: E-003417/2015.

¹⁴ Commission memo "February infringement package: main decisions" of 20 February 2014.

be able to prove that this has been done) is not proportionate to the threat as the same passengers are subject to border checks of the Swedish Customs and Police. It follows that the Ordinance providing for such border control is not proportionate to the threat either.

The sole object of the carriers liability to carry out ID-controls is to prevent potential asylum seekers to approach the Swedish border where they will be entitled to apply for asylum. However, under the Convention Relating to the Status of Refugees (done at Geneva on 28 July 1951, hereinafter the “Geneva Convention”) and the Dublin III Regulation,¹⁵ refugees have a right to apply for asylum.

Moreover, Article 26(b) provides that in making the proportionality assessment, the Member State shall, in particular, take into account the likely impact of the measure concerned on free movement of persons within the area without internal border control. In its opinion on the German and Austrian temporary introduction of border control at internal borders this autumn, the Commission underlined that it had “not received so far any complaints from citizens about the way border controls are carried out in practice. It appears that Germany made efforts to limit the negative effects on the bona fide travelers and the normal traffic flows by carrying out only targeted checks.”¹⁶ The Commission’s statement emphasizes the importance of limiting the negative effects of border controls on travelers and traffic flows. As previously mentioned it cannot be said that Sweden has attempted to make such efforts. There are also numerous considerable complaints against the Act and the Ordinance regarding their disproportionate impact on the free movement of persons in the Öresund area.

On 25 October 2016, a number of 565 train commuters over the Öresund bridge submitted an application to the Swedish Chancellor of Justice for compensation from the Swedish Government as the Act and the Ordinance contravene the free movement of persons pursuant to Articles 20, 21 and 77 of the TFEU, Article 45 of the Charter and the right to liberty of movement and the right of a citizen to enter the territory of the state of which he is a national according to Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As has been outlined in the application around 16 000 commute on a daily basis between residencies and work places over the Öresund Bridge and a vast number of commuters have had to leave their employments, move their homes to Denmark or Sweden to avoid having to commute over the bridge or to commute by car instead of public transportation.

The Swedish Chamber of Commerce has calculated that the costs of the delays caused by the ID-control amount to more than 1,5 billion Swedish Crowns per year.¹⁷

It follows from the above that the Act fails to take into account the procedural requirements set out in the Schengen Code regarding proportionate measures.

¹⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (OJ 2013 L 180/31).

¹⁶ Commission Opinion on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria, C(2015) 7100 final of 23 October 2015, point 36.

¹⁷ <http://www.handelskammaren.com/press/nyheter/nyhet/artikel/graenskontroller-kostar-15-miljarder/>

5 The Act and the Ordinance infringe EU rules on International Protection (asylum)

Article 4 of the Schengen Code expressly provides that the Code applies without prejudice to the rights of refugees and persons requesting international protection, in particular as regards the principle of non-refoulement.

In addition, Article 4 provides that when applying the Schengen Code, Member States shall act in full compliance with relevant Union law, including the Charter, relevant international law, including the Geneva Convention, obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights.

In order to assess the conformity of the Act and the Ordinance with EU law, it is therefore necessary to assess its conformity with the Charter, the Geneva Convention and other relevant rules concerning obligations related to access to international protection

Article 3(1) of the Dublin III Regulation (No 604/2013)¹⁸ sets out an obligation for the Member States to *examine any application* for international protection by a third-country national or a stateless person lodged on the territory of one of the Member States, *including at the border* or in the transit zones.

The Member State responsible for the examination is determined based on a number of objective criteria. Where no Member State responsible can be designated on the basis of these criteria, the first Member State in which the application for international protection was lodged shall be responsible for examining it (Article 3(2)). One single Member State shall be responsible for the examination of the application which shall be established based on the hierarchy of criteria set out in Chapter III of the Dublin III Regulation. If none of the criteria apply, the country where the applicant first applied for asylum shall be responsible for examining it.

However, it is not a violation of the Regulation to seek asylum in a Member State when that Member State is not the applicant's first country of arrival. The purpose of the Dublin Regulation is to ensure that the applicant has the right to asylum in the "Dublin Territory" and to establish a Member State responsible according to the responsibility criteria laid down.

The Swedish Act empowers the Government, or the authority designated by the Government, to adopt measures requiring carriers, under penalty of an administrative fine, to carry out identity controls on passengers and to deny boarding to those whose documentation is not in order. The Government adopted such measures through the Ordinance. By forcing the carriers to refuse boarding to passengers who do not possess

¹⁸ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

a valid identification document with a photo, the Government ensures that refugees and stateless persons are not able to reach the Swedish border and that they thereby are prevented from exercising their right under the Geneva Convention and under Article 3(1) of the Dublin III Regulation to submit an application for asylum. This also seems to be confirmed by the statement of the Minister of Infrastructure at the press conference on 18 December 2015, according to which the aim of the Ordinance is to reduce the number of persons seeking asylum in Sweden.

The European Commission, in its opinion approving Germany's and Austria's temporary reintroduction of border controls, clearly stated that the controls in those cases did not impinge on the rights of the persons seeking international protection.¹⁹ This is not the case with the Swedish measures.

Sweden thereby circumvents its obligations under the Geneva Convention, the Dublin III Regulation and the Schengen Code.

6 The Act and the Ordinance infringe EU competition law

Under Article 4(3) TEU, Sweden must ensure that the obligations arising from the EU law are fulfilled. Article 106 TFEU provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall not enact any measure contrary to the competition rules.

These two articles, read in conjunction, require a Member State to abstain from imposing regulations or measures which introduce distortions of competition and which would impede the efficiency of the EU competition rules. According to the case law of the EU Court of Justice, a State measure constitutes an infringement of EU competition rules when it will lead to inequality of opportunity between economic operators and therefore a distortion of competition.²⁰

A Member State is in breach of the prohibitions laid down by Article 106(1) TFEU in conjunction with Article 102 TFEU if it adopts any law, regulation or administrative provision that creates a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights, merely by exercising the preferential rights conferred upon it, is led to abuse its dominant position or when those rights are liable to create a situation in which that undertaking is led to commit such abuse.²¹ The Court of Justice has pointed out that practices by an undertaking in a dominant position which tend to strengthen that position by distorting competition amount to abuse of a dominant position within the meaning of Article 102 TFEU.²²

An infringement of Article 106(1) TFEU in conjunction with Article 102 TFEU may be established if an anti-competitive consequence, actual or potential, is liable to result from the State measure at issue. This may be the case when the State measure affects

¹⁹ Commission Opinion on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria, C(2015) 7100 final of the 23 October 2015, points 32 and 39.

²⁰ See eg Case C-462/99 *Connect Austria*, 22 May 2003, EU:C:2003:297, paragraphs 83 and 84, and Case C-553/12 P, *Commission v DEI*, 17 July 2014, EU:C:2014:2083, paragraphs 43 and 44.

²¹ See Case C-553/12 P, *Commission v DEI*, paragraph 41, and the case law cited.

²² See eg Case C-462/99 *Connect Austria*, paragraph 81, and the case law cited.

the structure of the market by creating unequal conditions for competition between companies.²³

In addition, a Member State is obliged to act in accordance with the principle of an open market economy with free competition, enshrined in Article 120 of the Treaty, and to comply with EU's fundamental legal principle of non-discrimination, which prohibits comparable situations from being treated differently, unless there is an objective justification.

The Act empowers the Government, or the authority the Government designates, to require the providers of transport services across the Öresund via ferry, bus and train to carry out identity controls on all passengers travelling to Sweden. Through the Ordinance the Government introduces such a requirement. However, the operator of the Öresund Bridge, the Öresund Consortium, which is owned to 50 per cent of the Swedish State and which is the sole operator with regard to trains crossing the Öresund and by far has the biggest market shares in terms of number of cars, lorries and buses that cross the Öresund (cf. table in Section 7), is not required to carry out any such controls. The additional burden imposed on the transport operators leads to a situation where the transport operators incur higher costs than the Öresund Consortium. As a result, the Öresund Consortium and the transport operators will not have equal opportunities to compete.

The fact that the Act and the Ordinance will lead to unequal opportunities to compete is indirectly confirmed in an unofficial document from the Swedish Government's legislative preparatory work regarding implementing measures to be adopted by the Government, in the form of an ordinance, *Draft Memorandum - Ordinance on specific identity controls*, where some of the effects of the Act, and the measures adopted thereunder, are (briefly) considered. In particular, the Draft Memorandum notes that:²⁴

- (a) Identity controls may lead to delays; and delays may be considered to be a decrease in quality.
- (b) Identity controls may lead to reduced transport capacity in terms of delays and wholly or partially cancelled departures.
- (c) Combined with increased costs for carriers as a result of the identity controls, it may in the end lead to a reduction of transport services offered across the Swedish border.
- (d) If it proves difficult to carry out fast and cost efficient identity controls, it cannot be excluded that certain train passengers in south Sweden may choose to travel by bus or car as a result of the Act.
- (e) With regard specifically to the ferries

“Controlling identity documents of all passengers travelling by ferries subject to the proposed regulation will entail a new handling method in ports and terminals, often within a limited time frame. Depending on to what extent the controls can be dealt with electronically, it will affect the type of personnel required. The

²³ See Case C-553/12 P, *Commission v DEI*, in particular paragraph 46.

²⁴ Draft Memorandum – Ordinance on specific identity controls, unofficial copy of the 30 November 2015 (Utkast Promemoria Förordning om särskilda identitetskontroller).

controls may result in longer lay-time in the ports and hence longer travelling time for passengers. If identity controls are conducted in an earlier phase - before the ferries arrive in port - to enable faster boarding, it may require the establishment of some kind of collecting point in the terminals.”

and:

“There may be resulting queues of pedestrians in the terminals as well as of vehicles such as cars, trailers, caravans, buses, transports of goods and other types of commercial traffic boarding the ferries. It cannot be excluded that these effects may result in an increased need of resources and personnel for ports, authorities and others involved in and around the ports. Queues may also lead to delays for goods transported by the ferries and affect the entire transport chain.”

When these effects are considered in relation to the fact that the operator of the Öresund Bridge has no obligation to carry out identity controls, it cannot be denied that the requirement of identity controls in accordance with the Act and the Ordinance will distort competition between the two directly competing operators on the market for transport services across the Öresund.

The distortion of competition takes two main forms. First, the implementation of the Act and the Ordinance will lead to an increase of costs for the transport operators, while the Öresund Consortium will have no such additional costs. Secondly, it will be comparatively faster and smoother to cross the border by the Öresund Bridge by car and lorry. The practical implementation of identity controls will lead to nuisances such as traffic jams and extended travel times. This effect is strengthened since the transport operators are forced to carry out the identity controls in Denmark before departure while the identity controls on the Öresund Bridge, if any, will be carried out by the Swedish Police in Sweden after the passenger has crossed the Öresund Bridge.

It is clear from the above that the Swedish Act and the Ordinance constitute State measures that will lead to inequality of opportunity between economic operators and therefore distort competition. It follows that Sweden, by enacting the Act and the Ordinance, infringes Articles 4(3) TEU and 106 TFEU read in conjunction with Article 102 TFEU.

As already indicated, neither the Act nor the Ordinance contains provisions regarding border controls at the Öresund Bridge. In the event that the Swedish Government, at the same time as the measures requiring ferry, train and bus operators to carry out border controls enter into force, would decide to also have border controls at the Öresund bridge, but carried out by the police and/or customs authorities, there would still be a State measure leading to inequality of opportunity and distortion of competition between economic operators.

Given the set-up of the controls currently carried out by the police at the bridge under the presently applicable Swedish measures temporarily reintroducing border control at internal borders (adopted under Article 25 of the Schengen Border Code), it seems more than likely that any future control on the Öresund Bridge would not encompass all people. In fact, according to a public statement of the police, these controls are carried

out on a random basis or when there is a concrete reason.²⁵ This means that even if border controls were to be carried at the Öresund Bridge, the Öresund Consortium would have a competitive advantage, as it would not have the same costs and inconveniences as those forced upon the transport operators, having to carry out the controls of all passengers by themselves under the measures introduced by the Government.

7 The Act and the Ordinance constitute restrictions on the freedom to provide services

The Swedish Act and the Ordinance constitute restrictions on the freedom to provide services under Article 56 TFEU. These restrictions cannot be justified by an overriding reason relating to the public interest as they are not suitable to attain their objective and because they go beyond what is necessary to achieve that objective.

7.1 The Act and the Ordinance restrict the freedom to provide services

Under the FEU Treaty and the case law of the EU Court of Justice, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The EU Court of Justice has held that Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction on the freedom to provide services, even if that restriction applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State where it lawfully provides similar services.²⁶

In addition, according to the established case law of the EU Court of Justice, the right to provide services may also be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State.²⁷

The Ordinance, adopted on the basis of the Act, requires the transport operators to carry out identity controls on all its passengers travelling to Sweden. This will significantly raise the costs of the transport operators and lead to other inconveniences such as traffic jams and delays which will influence the ability of the transport operators to offer their services. Both the Act and the Ordinance thus clearly impede and render less attractive the transport operators' provision of transport services across the Öresund. It follows from the above that the Swedish Act and the Ordinance constitute restrictions on the freedom to provide services.

²⁵ Swedish Police, Sweden has introduced temporary border controls, https://polisen.se/PageFiles/601095/Faktablad_tillfalliga_granskontroller.pdf. Accessed 17 December 2015.

²⁶ See, among others, Case C-98/14 *Berlington Hungary and Others*, judgment of 11 June 2015, EU:C:2015:386, paragraph 35.

²⁷ See, among others, Case C-384/93 *Alpine Investments*, judgment of 10 May 1995, EU:C:1995:126, paragraph 30, and Case C-60/00 *Carpenter*, judgment of 11 July 2002, EU:C:2002:434, , paragraph 30,

7.2 The measures cannot be justified

Restrictions on the freedom to provide services may however be justified where they serve overriding requirements relating to the public interest, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.²⁸

The measures serve an overriding requirement relating to public interest

In the case at hand, the Government invokes a serious threat to public order and to its internal security due to the massive influx of immigrants. It would therefore appear that the measures may be justified by the protection of public security, which has been recognised by the EU Court of Justice as an overriding requirement relating to the public interest.

The measures are not suitable to attain the objective

However, the Act and the Ordinance are not suitable for securing the objective pursued.

According to the Government, the aim of the Act and the Ordinance is to avert the risk to the public order and internal security due to the influx of persons seeking international protection. The Government further states that the measures are needed to control who enters Sweden.²⁹ As noted above, the majority of the travellers who cross the Öresund do so by car or lorry via the Öresund Bridge.

The Act, and consequently also the Ordinance, thus exclude the largest provider of transportation services across the Öresund from the obligation to carry out identity controls on passengers in cars and lorries travelling to Sweden. This implies that the majority of people travelling to Sweden via the Öresund will not undergo any identity control. In addition, the introduction of identity controls in accordance with the Act means that cars and lorries, to a larger extent than today, will choose the Öresund Bridge. This in turn will further reduce the number of people undergoing an identity control.

In the event that the Swedish Government, at the same time as the measures requiring ferry, train and bus operators to carry out border controls entered into force, would decide to also have border controls at the Öresund bridge, but carried out by the police or customs authorities, the measures concerned would still not be suitable to attain their objective, since, as indicated above, given the set-up of the controls currently carried out by the police on the bridge, it seems more than likely that any future control on the bridge would not encompass all people, but would only be carried out on a random basis or when there is a concrete reason.³⁰ In addition, such controls would be carried

²⁸ See e.g. Joined Cases C-94/04 and C-202/04 *Cipolla*, judgment of 5 December 2006, EU:C:2006:758, paragraph 61.

²⁹ The Minister of Infrastructure stated at the Press Conference on 18 December 2015 that the objective of the Act was to limit the number of asylum seekers entering Sweden. See Section 3 above.

³⁰ Swedish Police, Sweden has introduced temporary border controls, https://polisen.se/PageFiles/601095/Faktablad_tillfalliga_granskontroller.pdf. Accessed 17 December 2015

out at the Swedish border, and not, as in the case of controls carried out by the carriers, in the country of departure, and would thus allow refugees to submit an application for international protection. They would thus have little effect on the influx of persons seeking international protection.

The measures are not necessary

Moreover, it is not possible for Sweden to argue that requiring ferry, train and bus operators to carry out identity controls on all their passengers is necessary to protect public order and internal security in the country, as the largest supplier of transport services across the Öresund is not covered by the rules and therefore the majority of the people crossing the Öresund and entering Sweden by cars and lorries will not be controlled, or, in case controls will be carried out by the police and/or the customs authorities, will only be carried out on a random basis or when there is a concrete reason.

To conclude, the Act and the Ordinance requiring ferry, train and bus operators to carry out identity controls on all their passengers travelling to Sweden constitute a restriction on the freedom to provide the transportation services across the Öresund that cannot be justified. The Act and the Ordinance are therefore contrary to the freedom to provide services as set out in Article 56 TFEU.

8 The Act and the Ordinance are contrary to the Charter of Fundamental Rights of the European Union on the freedom to conduct business

Article 16 of the Charter, on the freedom to conduct a business, protects the freedom to exercise an economic or commercial activity, the freedom of contract and free competition.³¹ Article 17 (which is based on Article 1 of the First Protocol to the European Convention of Human Rights) protects the right to property.

An introduction of an obligation to carry out identity controls in accordance with the Act limits the carriers' freedom to exercise an economic or commercial activity, and is, thus, contrary to the freedom to conduct a business. It would also have the effect of limiting operators' opportunity to use their property, which can be equated to a regulation of utilisation in the meaning of Article 1.2 of the First Additional Protocol to the European Convention of Human Rights. According to the case law of the European Court of Human Rights, the term regulation of the use of property is defined as a measure which, although not involving a transfer of ownership, seeks to restrict or regulate the property's use.³² The introduction of an obligation to carry out identity controls in accordance with the Act and the Ordinance may thus also constitute a restriction of the operators' rights to property.

³¹ See Case C-283/11 *Sky Österreich and Österreichischer Rundfunk*, judgment of 22 January 2013, EU:C:2013:28, paras 41 and 42, and the case law cited.

³² See e.g. ECHR judgments in *Sporrong and Lönnroth Sweden* of 23 September 1982, Series A No 52, para 65, and of 19 December 1989, *Mellacher and Others v Austria* of 19 December 1989, Series A No 169, para 44. The EU Court of Justice has also referred to the concept of control of use of property, see, inter alia, Case C-347/03 *Regione Autonoma Friuli-Venezia Giulia and ERSA*, judgement of 12 May 2005, EU:C:2005:285, paras 124 and 125.

The Freedom to conduct a business and the right to property may be limited,³³ but in accordance with Article 52.1 of the Charter, any limitation on the exercise of the rights and the freedoms recognised in the Charter must be regulated by law and must respect the essence of those rights and freedoms. Restrictions may, with respect of the principle of proportionality, be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.³⁴

Both the Act and the Ordinance are contrary to the principle of proportionality. As noted above, they are not suitable for securing the objective pursued, i.e. the protection of public order and internal security in the country, and they are not necessary to ensure this objective since they do not prescribe an obligation to carry out identity checks on passengers with cars and lorries traveling into Sweden via the Öresund Bridge, or, in case controls will be carried out by the police and/or the customs authorities, such controls will only be carried out on a random basis or when there is a concrete reason.

It follows that the Act and the Ordinance are contrary to Article 16 and Article 17 of the Charter.

9 The Act and the Ordinance contravene the free movement of persons and the right to enter the territory of the state of which a person is a national

9.1 The Act and the Ordinance infringe the TFEU and the EU Charter of Fundamental Rights

Free movement of workers is a fundamental principle enshrined in Article 45 of the Treaty on the Functioning of the European Union and developed by EU secondary legislation and the Case law of the Court of Justice. According to Article 45.1 of the Charter every citizen of the Union has the right to move and reside freely within the territory of the Member States. Pursuant to the Schengen Border Code a member state, where there is a serious threat to public policy or internal security in a member state, reintroduce border controls of its internal borders in accordance with Title II of the Schengen Border Code. However, the ID-controls provided for by the Act and the Ordinance are not such measures as are approved under Title II and consequently contravene the freedom of movement as enshrined in the TFEU and the Charter.

As has been pointed out above the Commission has on more than one occasion confirmed that carrier's liability cannot be introduced in connection with intra Schengen transports.

³³ Ibid., paras 45 and 46, and case law cited, and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others*, judgement of 12 July 2005, EU:C:2005:449, para 126, and case law cited.

³⁴ Ibid., para 48.

9.2 The Act and the Ordinance contravene the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Act and the Ordinance contravene the right to liberty of movement and the right of a citizen to enter the territory of the state of which he is a national according to Articles 2 and 3.1 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to Article 6 of the Protocol as between the contracting parties the provisions of Articles 1 to 5 of the Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

With reference to what has been stated above regarding the non-compliance of the Act and the Ordinance in regard to EU Law the Act and the Ordinance contravene the freedom of movement as enshrined in the European Convention.

Moreover, the Act and the Ordinance constitutes an impediment for Swedish citizens to enter into Sweden from Denmark. The Act and the Ordinance contains no provisions which will allow passengers to identify themselves by other means than presenting a valid ID-card. Thus, a great number of Swedish citizens are on a daily basis denied access to buses, ships or trains to Sweden and offered the advice to visit the Swedish Embassy in Copenhagen to obtain a valid travel document. The Embassy is however open only on office hours and closed on weekends, whereby in many cases several days may pass before a Swedish citizen without a valid ID-card may be allowed to enter into Sweden.

Hence, the Act and the Ordinance contravene the right of a citizen to enter the territory of the state of which he is a national and which right as outlined above is enshrined in Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Malmö 23 November 2016