

A scenic landscape featuring a calm river in the foreground, reflecting the sky and surrounding greenery. In the middle ground, a blue PostNord truck is driving on a road that curves along a rocky bank. The background consists of dense evergreen forests covering rolling hills under a bright, slightly overcast sky.

## **Access regulation and competition; key cases - The Swedish consolidator case**

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- PostNord offers **communication- and logistics solutions** to, from and within the Nordics.
- It is the result of a **merger** between the Danish and the Swedish posts in 2009.
- PostNord had a turnover in 2016 of appr. **38 billion SEK and appr 35 000 employees.**
- PostNord is the **designated operator** of postal services in both Sweden and Denmark.

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# The consolidator case in Sweden

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**THE LAW WON**

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# Background

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- In **February 2015** the EU Court decided that the Belgian Post, bpost, **may differentiate its pricing between end customers and so called consolidators** (collecting posts from different senders) in respect of the annual volume rebate, i.e. the consolidator may be offered a rebate based on the volume of each of its customers, ***a per sender-model***, **instead of based on the total volume**
- The case concerned the prohibition on discrimination in **the postal directive (article 12.4/5)**
- **The Court's definition:** customers "define the message which is to be sent and originate the requests for mailings. The consolidators supply senders with routing services upstream from the postal distribution service."
- **The reason** why the Court held that there was no discrimination was that consolidators and end customers **were not in "comparable situations"**. Only the senders were in a situation to "**stimulate demand** in the area of postal services" (which was the purpose of the discount) since they are "responsible for originating postal items"

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# What is not in the judgement?

- **Operational discounts** – In Deutsche Post case (C-141/08); Article 12 precludes refusal to apply to consolidators the special tariffs which the national USP grants to the senders themselves in respect of operational discounts.
  - So operational discounts, such as sorting rebate and other perform based discounts, must be offered to all customers including consolidators
  
- **Monopoly market** – The Court **does not attach any importance to the fact that the market in Belgium at the time was a monopoly**; on the contrary the Court stresses that the purpose of the discount is to increase demand for the market as well as the operator (“The quantity discounts per sender are such as to encourage the senders to hand on more mail to bpost, enabling it thereby to make economies of scale.”, para 47)
  - So arguing that the judgement is not applicable if the national market is competitive is unfounded
  - If the reason for the discrimination prohibition is to promote competition, why should it be **more strictly construed in a market with e2e-competition than on a monopoly market?**

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# Swedish Competition Case

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# Competition case

- PostNord wanted to implement the same per sender model in Sweden as bpost in Belgium. PostNord thus informed the market and both the NRA (Post- och Telestyrelsen) and the NCA (Konkurrensverket) of its plans during spring 2015
- In the autumn 2015 two consolidators submitted their complaints to the NCA, which thoroughly investigated the case
- The main issues were:
  - **Price discrimination**; was not at hand due to the consolidators not being competitors to the end customers and the differentiation thus did not restrict competition
  - **Foreclosure 1**; did not create any loyalty effects since it did not effect the willingness of the end customers to contract PostNord
  - **Foreclosure 2**; no margin squeeze since the operational discounts were not affected
  - **Unfair contract terms**: PostNord provided a system based on anonymised customer information, confidentiality clauses, limited access to confidential information and thus no further action was needed
- In its decision of 6 November 2011 (cases dnr 638/2015 and 639/2015) the NCA concluded that it **found no reason to take any further action**

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# Swedish regulatory case

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- The same two consolidators also approached the NRA, PTS, who 8 December 2015 **issued an injunction** that PostNord must offer the same annual discounts to all customers including consolidators
- PTS considered the differentiation to **be in breach of the non-discrimination** clause in the Swedish Postal Act (a copy of the prohibition in the Postal Directive)
- PTS decision **entered into force immediately** and PostNord was prohibited from implement the new model from 1 January 2016 as planned
- According to PTS **the EU court decision was not “directly applicable in the market situation in Sweden”** (being a competitive market ).
  - On such a market the annual discount is merely a **means for competition**. Thus, the annual discount mainly stimulates the demand for that specific operators’ services and not the demand of postal services as such.
  - On such a market end customers and consolidators are in a **comparable situation** as customers to PostNord

- PostNord, who considered the Swedish postal market as part of the EU, **appealed to the Administrative Court** (Förvaltningsrätten), first claiming for the court to issue interim measures.
- **No interim measures** were issued by the Administrative Court nor the Administrative Court of Appeal (Kammarrätten)
- In respect of the issue of discrimination the Administrative Court stated (case 27651-15, decision 29 June 2016) that **the judgement of EU Court was applicable also on the Swedish market:**
  - it is likely that the decision is applicable both on a monopoly and a competitive market
  - the interpretation of the decision made by PTS would also have as its effect that postal operators would have to **apply different terms in different member states** and that is not reasonable
  - **Comparable situation? No**, a model where the consolidators are offered a discount based on all volume could have a negative effect on demand in general, which is detrimental to the object of the discount

- PTS appealed to the **Administrative Court of Appeal** (case 4722-16, decision 28 December 2016)
- The Court **did not find any reason to change the judgement** of the Administrative Court and stated:
  - Even though a discount may have several objectives, the EU Court has decided that a **volume discount's purpose is to increase demand**
  - The fact that there may be **different competitive conditions on different market has not been of importance** to the EU Court
  - Thus senders and consolidators are **not in a comparable situation** on the Swedish market either
- Then the authority PTS appealed to the **Supreme Administrative Court** (Högsta Förvaltningsdomstolen; case 355-17) and also moved for a referral to the EU Court
- The Supreme Court (decision 13 June 2017) did not grant a review permit and stated in its decision:
  - **“The relevant EU law in the case has already been interpreted by the EU Court”**

- EU Court decision in February 2015 made a per sender volume discount possible
- The Swedish NRA claimed the EU Court decision not to be applicable in Sweden due to a fact that was not even given any attention to by the EU Court and took the case “all the way”
- Due to that, PostNord have not been able to implement the new model in two years and actually have had to apply a model that the EU Court found detrimental to the objective of increasing demand
- But since the 13 June PostNord may implement the model and EU law applies also in Sweden!