

## COMPLAINT CONCERNING SVENSKA KRAFTNÄT'S REGULATION OF TRANSMISSION CAPACITY ON "ØRESUNDSFORBINDELSEN"

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### 1. INTRODUCTION

- 1.1 This is a complaint against Svenska Kraftnät (hereinafter "SvK") as regards SvK's regulation of transmission capacity on the electrical connection between Southern Sweden and Eastern Denmark – the Øresund interconnection (hereinafter "Øresundsforbindelsen"). It is submitted that SvK has a policy of limiting transmission capacity through Øresundsforbindelsen not for reasons of securing supply of electricity but for reasons of lowering costs connected to counter purchase and in order to lower the spot price in Sweden as well. The limitation of Øresundsforbindelsen has a damaging effect on competition and trade within the internal electricity market especially as regards Southern Sweden and Eastern Denmark.
- 1.2 SvK's behaviour causes higher prices within Eastern Denmark. As a clear-cut example of the effect of SvK's policy the case of 28 and 29 November 2005 is described in this complaint and in further detail in the report from Energinet.dk [Annex 3](#).
- 1.3 It is submitted that SvK's behaviour is a violation of the applicable EU legislation concerning the internal electricity market and the rules on free movement of goods, cf. Articles 28 and 29 of the EC Treaty, and the prohibition against abuse of a dominant position cf. Article 82 of the EC Treaty.
- 1.4 The complainant is Dansk Energi (Association of Danish Energy Companies), being the trade organisation for Energy Companies operating in Denmark. Members are electricity- and CHP-generating companies (8 members covering app. 80 per cent of the Danish electricity consumption), electric trading companies (nearly 100 per cent coverage) and distribution companies (app. 97 per cent coverage). Among the members are DONG Energy, Vattenfall and E.On. The members of Dansk Energi has suffered a loss because of SvK's behaviour. The members who are traders have suffered a loss due to unexpected high prices in Eastern Denmark and even the producers have suffered a loss since SvK's random behaviour makes the market in-transparent. The Danish and probably also Norwegian and German power consumers have also suffered a loss due to the higher prices caused by the lack of supply from imports/exports from Sweden. SvK has

gained on its behaviour because it has reduced the need for costly counter purchase and the Swedish consumers have also gained on the price manipulation carried out by SvK with the aim at lowering power spot prices in Sweden at the expense of players and consumers outside Sweden. The loss will always be larger than the gain in a situation like this where the relevant market is restricted from functioning in an optimal way which is to allow as much power to be transmitted subject to security of supply only.

- 1.5 In 2002 Dansk Energi decided a clear vision for the electricity sector with a primary focus on creating an efficient energy market without national borders based on transparent regulation of the market and rules for trading between the countries. The focus is not only on the Nordic market but also the German and Polish market (cf. the North-European "Miniforum"-initiative). The rationale is that an open and transparent market is a prerequisite for the competitiveness of medium size and small energy companies in Europe – generating companies as well as trading companies, as they can not be protected by national regulation. Moreover another essential focus of Dansk Energi is to improve the image of the energy sector and the confidence of the customers. This goal is strongly linked to the consumers trust in electricity prices based on a well-functioning competition in the market. For the consumer-owned members of Dansk Energi fair pricing is even more essential.
- 1.6 The alleged unlawful behaviour has been going on for many years and all means have been used to solve the problem bilaterally. Hence, there has been a dialogue between the Danish and Swedish ministers for Energy but nevertheless no solution has been found. A copy of the letters are attached as Annex 2. The problem has increased over the last year due to the closure of the nuclear power station in Southern Sweden "Barsebäck" and a higher demand in Southern Sweden. The complainant believes that a solution can only be found with the aid of the European Commission enforcing the rules adopted by the EU. The complainant further believes that the outcome of the analysis to be carried out by the so called "pompe" committee will not solve the problem since this committee will only take into account Swedish interests and disregard the EU dimension.
- 1.7 On the basis of the above the European Commission is hereby requested to open a case of breach of the rules on free movement of goods in the EC Treaty against the Kingdom of Sweden and a case of abuse of dominant position against SvK under Regulation 1/2003, Article 7(2), cf. Regulation 773/2004, Article 5 and Article 86(3) of the EC Treaty, respectively.

2. EXECUTIVE SUMMARY

- 2.1 SvK is the Transmission System Operator in Sweden (hereinafter "TSO") and is as such responsible for the functioning of the transmission systems within Sweden and to and from Sweden. SvK's main duty is to ensure a safe, reliable and efficient electricity system.
- 2.2 There seems to be several physical transmission bottlenecks between the Northern and Southern parts of Sweden, which make it difficult to meet the demand for transmission of inexpensive hydropower from Northern Sweden to Southern Sweden if electricity is at the same time exported from Southern Sweden to Eastern Denmark.
- 2.3 The legal framework governing the activities of SvK sets out that SvK shall seek to secure the supply of electricity and competition and non-discrimination on the internal electricity market. Further, the EC Treaty's Article 82 prohibits SvK from abusing its dominant position as TSO.
- 2.4 SvK restricts transmission of power through Øresundsforbindelsen not for reasons of securing supply of power but in order to diminish the costs connected to counter purchase and to manipulate the electricity spot price in Sweden.
- 2.5 On 28 and 29 November 2005, a situation emerged which clearly illustrates SvK's policy aiming at preserving one single Swedish price area not by counter purchase but by blocking transmission from Sweden to Denmark, even though the Karlshamn plant in Southern Sweden had spare production capacity. The result was that the hourly spot price on Nord Pool for Eastern Denmark (DK2) increased to an extremely high level. SvK has thus far not disputed that it limited the transmission capacity on Øresundsforbindelsen only for economic reasons (to reduce the costs pertaining to counter purchases and to maintain an artificially low spot price in Sweden) - not for reasons of securing power supply.
- 2.6 It is submitted that SvK, being a state monopolist, must meet the objectives in EU and Swedish legislation governing the activities of SvK, and no other objectives. An economic objective does not seem to be a legitimate goal under applicable law. On the contrary, pursuing this goal is contrary to another objective, which SvK must meet, namely the enhancement of the competition on the internal market for electricity
- 2.7 On this basis, it is submitted that SvK has violated the rules governing its activities by pursuing objectives, which are contrary to the objectives set out by the legal framework for SvK. The behaviour of SvK is not only a hindrance of the free movement of goods

and EU legislation providing for the internal electricity market but also a hindrance to competition in the internal market and as such an abuse of SvK's dominant position as TSO.

- 2.8 Therefore it is submitted that SvK as a state owned and regulated entity has violated the fundamental rule in Articles 28 and 29 (free movement of goods) without reasoning in Article 30 in the EC Treaty and the EU legislation concerning the internal market for electricity in Regulation 1228/2003 on conditions for access to the network for cross border exchanges in electricity and Directive 2003/54 concerning common rules for the internal market in electricity. Further, it is submitted that SvK's behaviour constitutes an abuse of SvK's dominant position in violation of the prohibition thereof in Article 82 of the EC Treaty.
- 2.9 On this basis the European Commission is hereby requested to open a case of breach of the EC Treaty against the Kingdom of Sweden and a case of abuse of dominant position against SvK.

### 3. THE ENERGY MARKET IN SWEDEN AND DENMARK

#### 3.1 General introduction

3.1.1 The Nordic countries have reformed and liberalised their electricity sector over the past 10-15 years. There is a high degree of trade between the Nordic countries and thus also between Sweden and Denmark. The development of a common Nordic power trade area started with the Norwegian Energy Act in 1991, which reformed the market from regulation to liberalisation. Sweden followed in 1996 and deregulated the market in full in November 1999, Finland in November 1998 and in Denmark the market has been gradually liberalised from 1999 to 2003.

3.1.2 Furthermore, the Nordic countries have established a common electricity trade area in the Nordic region facilitated by the Nordic Electricity exchange referred to as Nord Pool ASA (hereinafter "Nord Pool"), which is a Nordic power exchange and is owned by the Norwegian "Statnett" and the Swedish SvK with 50% each. The subsidiary Nord Pool Spot, which is jointly owned by the Nordic TSOs<sup>1</sup>, is a market place for producers, distributors, industrial companies, energy companies, trading representatives, large consumers and TSOs where they may trade physical power.

The Nord Pool area comprises Norway, Sweden, Finland and Denmark. The Nordic countries and the different price areas in the Nord Pool area are linked together by several interconnections. The Nordic countries are also linked to countries outside the Nord Pool area. Historically and practically (and at the request of national TSOs) the market has, however, been divided into a number of price areas, see the figure below:

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<sup>1</sup> According to the annual report for Nord Pool ASA 2004, Nord Pool ASA owns 20%, SvK 20%, Fingrid (the Finish TSO) 20%, Statnett (the Norwegian TSO) 20% and the previously two different TSOs in Denmark 10% each. After the establishment of "Energinet.dk" only one TSO is represented in Denmark having 20% ownership of Nord Pool Spot.

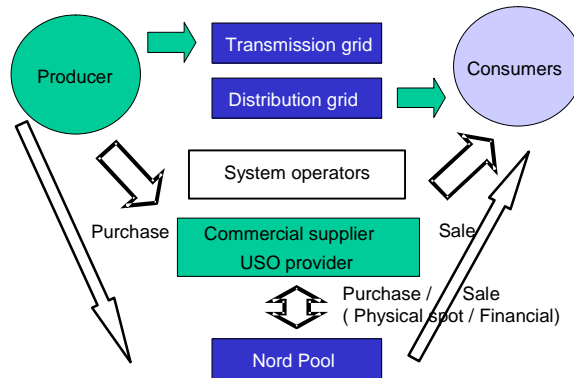
**Nord Pool's six fixed *Elspot* areas<sup>2</sup>**



- 3.1.3 The German market has traditionally not been a part of the Nord Pool area, but there has been a high degree of power exchange between Germany and Denmark and Sweden, which is why Germany clearly influences the price setting in the Nordic countries, especially in Denmark and Sweden. However, in October 2005 Nord Pool was extended with a new price area, the so-called Kontek in Northern Germany. Nord Pool administers the Kontek cable in line with other interconnection within the "Nordel" area, cf. below. However, Kontek is not a separate Nord Pool price area as the different areas illustrated in the figure above, but a market where all German traders similar to the Nordic traders mentioned above in 3.1.2 can trade electricity together with the Nordic traders.
- 3.1.4 The Nordic countries are furthermore connected to other countries in the Northern European region e.g. through interconnections between Western Denmark (DK1) and Germany; Sweden and Germany as well as Sweden and Poland and a connection between Norway and the Netherlands is under construction. Norway and Finland are also connected to Russia.
- 3.1.5 The below figure illustrates the various players in the power market:

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<sup>2</sup>Cf. Nord Pool's website [www.nordpool.com](http://www.nordpool.com)



As shown in the figure, there are mainly three kinds of players in the power sector: Producers of electricity, transmission and system operators (TSOs) and a group, which may be characterized as traders. And naturally the sector also has end-users, which are illustrated as consumers in the figure. Thus, the figure illustrates the value chain in the electricity market. The horizontal flow is the physical transport of electricity, while the vertical flow illustrates trade relations in connection with the purchase and resale of electricity.

3.1.6 Electricity is transmitted from power stations to consumers through a grid or network of power transmission lines. In general, the network has three levels: the national grid, the regional networks and the local networks. The consumption and generation of electricity must be in balance at any time, and this balance is ensured by balance control. For this purpose, each country has a TSO, which is responsible for securing the supply of electricity i.a. by maintaining the balance and operate the national grids. All the Nordic TSOs co-operate in the organisation "Nordel".

3.1.7 The trading possibilities within the Nordic region and between the Nordic region and other countries depend on the capacity of the transmission lines, e.g. the cable between Denmark and Sweden across "Øresund". The capacity between these two countries may be illustrated as follows<sup>3</sup>:

Country	Capacity (MW)	Capacity (MW)
Sweden/Denmark	Sweden -> Denmark	Denmark -> Sweden
Western Denmark (DK1)	460	490
Eastern Denmark (DK2)	1300	1700

<sup>3</sup> Cf. Nord Pool's website [http://umm.nordpool.com/marketinfo/umm/web/tso\\_12\\_month.html](http://umm.nordpool.com/marketinfo/umm/web/tso_12_month.html)

This capacity is the maximum trading capacity, which is smaller than the technical maximum capacity due to system considerations. The TSOs reserve some spare capacity to ensure security of supplies, and it should therefore be emphasised with respect to the TSOs' interconnection capacity that the TSOs have agreed to reserve a regulated margin between transmission capacity and trading capacity. Therefore the trading capacity differs from hour to hour and is in practice often smaller than maximum due to system considerations like bottlenecks, outages of power lines and power plants, etc.

- 3.1.8 In Northern Europe, the electricity is generated from different sources of energy. The primary sources of energy are hydro energy (Norway, Sweden and Finland), nuclear energy (Sweden, Germany and Finland), fossil fuels (thermal) (Denmark, Germany and Finland) and wind energy (Denmark, Sweden and Germany). Neither producers nor consumers may rely entirely on quantities in advance. Production units are dependent on stable operations, supply of fuel or wind force. Consumers are free to demand electricity without notice and electricity cannot be stored. When power is traded between these countries, they use the possibility of interconnecting the different types of power production – as regards Sweden and Denmark especially hydropower, wind power and thermal power.
- 3.1.9 As illustrated in the figure above in 3.1.2, Nord Pool operates with different price areas, Denmark being divided into two different areas and Sweden being regarded as one price area. Electricity is traded through Nord Pool or by bilateral contracts.
- 3.1.10 The TSOs operate the transmission capacity within their respective areas through Nord Pool. As also mentioned above in 3.1.2 the TSOs in the Nordic countries and Nord Pool own the separate subsidiary Nord Pool Spot, which operates the regulated marketplace for physical-delivery power contracts. Following the ownership of Nord Pool it is also the TSOs, which define the different price areas within the Nordic countries. The allocation of trading capacity is done by Nord Pool and in case of congestions each predefined bidding area will come into force with separate spot prices.
- 3.1.11 The daily procedures for calculations of spot prices are as follows: Nord Pool receives the interconnected trading capacities from the TSOs based on the capacity set by the TSO announcing the smallest capacity. Based on electricity sales and buy bids from the commercial market players, cf. figure above in 3.1.5, Nord Pool calculates daily spot prices for each price area conditioned on the trading capacities submitted by the TSOs one day ahead. No congestions mean no difference in spot prices between the areas of relevance.

3.1.12 The ownership of interconnections between two Nordic countries is separated at the border. Thus, the market for transmission of electricity is a legal and regulated monopoly in each country. For instance, SvK is responsible for the Swedish transmission system under section 1 of the Swedish "förordning (1994:1806)". Pursuant to this legal regulation, all TSOs have by definition a dominant position.

### 3.2 The Danish electricity sector

#### 3.2.1 General

The Danish generation and wholesale segment has been liberalised in 2000, and as from 1 January 2003 the end-user market has also been fully opened.

Geographically, the Danish segment is placed between larger power segments to the south (Germany) and to the north (Norway and Sweden). The Danish power segment is based on conventional thermal power, and the production is primarily based on coal and gas. In addition, Denmark has renewable energy sources, mainly wind energy.

According to the Nordic Competition Authorities, there is excess generation capacity in Denmark and an insufficient production capacity in the countries to the north. Denmark is therefore expected to increase export of power in the future<sup>4</sup>.

#### 3.2.2 Transmission and network operators

3.2.2.1 The Danish TSO is "Energinet.dk" - an independent, publicly owned corporation under the Ministry of Transport and Energy with its own supervisory board. The TSO was established in 2005. In its capacity of TSO, Energinet.dk has the main responsibility of the Danish transmission system and is subject to Danish law.

3.2.2.2 Under the Danish Act on Electricity Supply<sup>5</sup>, Energinet.dk is responsible for securing the supply of power, i.a. by maintaining the balance between the supply (i.e. production) of and demand (i.e. consumption) for electricity in the Danish high voltage grid.

3.2.2.3 The ownership of the 400 kV transmission grid was on 1 January 2005 – following a merger of the two former TSOs in Denmark into Energinet.dk – transferred to Energinet.dk, which is also co-owner of the transmission connections to other countries with

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<sup>4</sup> Cf. "A Powerful Competition Policy", Report from the Nordic competition authorities, 20 June 2003, page 20.

<sup>5</sup> "Lovbekendtgørelse 286 of 20 April 2005".

other national sister TSOs in these countries. Furthermore, Energinet.dk has the 132 kV and 150 kV electrical grids at its disposal. The day-to-day administration of these Nordic interconnections has been delegated to Nord Pool, cf. above 3.1.10 and 3.1.11.

- 3.2.2.4 The local distribution grid is owned by approximately 100 grid companies (owned by the consumers directly, by municipalities or by the state, i.e. public ownership), each holding a small share of the remaining local distribution grid and network system in Denmark. These local grid operators were separated from the original supply companies into individual companies in accordance with the Danish Act on Electricity Supply in connection with the liberalisation of the electricity market. They are responsible in their respective area for the operation and maintenance of the local distribution grid, and for the transportation of electricity to consumers. They are also responsible for metering the electricity volumes supplied through the network and consumed and for sending these data to producers, balance supervisors, electricity trading enterprises, consumers and Energinet.dk.
- 3.2.2.5 Denmark has implemented Directive 2003/54/EC concerning common rules for the internal market in electricity. Under Danish law, generation is therefore separated from transmission and distribution, and each activity must be carried out in separate companies.
- 3.2.2.6 The Danish Nord Pool area consists of two separate price areas: Denmark West (hereinafter "DK1") and Denmark East (hereinafter "DK2"). The two areas are not interconnected, as there is no connection across "Storebælt". However, the two areas form part of the joint North European power market through interconnections between DK1 and Germany, Norway and Sweden as well as interconnections between DK2 and Sweden and Germany. The high voltage transmission grid of DK2 is connected to Sweden through Øresundsforbindelsen. This interconnection is jointly owned by the two national TSOs – Energinet.dk and SvK – which are also in charge of the administration of the interconnection. However, the day-to-day administration has been delegated to Nord Pool as explained above. DK2 is furthermore connected to Germany through the Kontek interconnection, which also is made available for Nord Pool like the Nordic interconnections. As mentioned above in 3.1.3, the Kontek trade area has been part of Nord Pool since October 2005.
- 3.2.2.7 The transmission capacity between the two Danish submarkets and the Nordic and Germany respectively indicates that the Danish electricity market is a relatively open

market. An overview of the Danish production and transmission capacity can be illustrated as follows<sup>6</sup>:

As per 1 January 2006 (MW)	DK1 (West)	DK2 (East)
Total production capacity	7.509	5.145
Transmission capacity from Sweden	460	1.300
Transmission capacity from Norway	1.000	0
Transmission capacity from Germany	800	550
Total transmission capacity	2.260	1.850
Transmission capacity in % of total production capacity	30%	36%

### 3.2.3 Power production in Denmark

3.2.3.1 Denmark's power generation is primarily based on coal and natural gas-fired combined heat and power stations, and on condensing power stations. A minor proportion of the power generated is based on bio fuels. Among the Nordic countries, Denmark has the highest proportion of electricity generated by wind power.

3.2.3.2 In March 2006, the EC Commission approved the acquisition of the two large generation companies "Elsam A/S" and "Energi E2" by the Danish energy company "DONG A/S", which is owned by the Danish state. Elsam is active in DK1 and Energi E2 in DK2. The total installed capacity was approximately 7,500 MW and 5,200 MW (including wind-mills) in DK1 and DK2, respectively. This means that DONG will be in charge of the main part of the Danish electricity production. Following this merger, approximately 25% of the production capacity will, however, under a pre-merger agreement be diverted to the Swedish power company Vattenfall, which will therefore be present in Denmark as well<sup>7</sup>. Vattenfall will control i.a. central power plants in Northern Jutland ("Nordjyllandsværket" in DK1), in Funen ("Fynsværket" in DK1) and one of the large power plants near Copenhagen ("Amagerværket" in DK2), as well as a part of a wind-mill farm in the North Sea ("Horns Rev" in DK1) and some smaller plants in DK2.

### 3.3 The Swedish electricity sector

#### 3.3.1 Transmission and network operators in general

<sup>6</sup> See [http://umm.nordpool.com/marketinfo/umm/web/tso\\_12\\_month.html](http://umm.nordpool.com/marketinfo/umm/web/tso_12_month.html) and [http://miljorapport2006.composite.net/media\(587,1030\)/Ref.\\_14.pdf](http://miljorapport2006.composite.net/media(587,1030)/Ref._14.pdf), page 9.

- 3.3.1.1 It is the overall responsibility of the Swedish Energy Agency to ensure that the Swedish national transmission grid is operated efficiently, that the grid tariffs to customers are reasonable and that the grid companies do not stifle competition on the market for the supply of electricity. Swedish law delegates this task to the Swedish TSO - SvK (Svenska Kraftnät).

The largest electricity producers, a couple of municipalities and industrial companies, own the regional distribution grids, while the Swedish government owns the national transmission grids. Approximately 200 network companies, which are either members of power producing companies, municipalities or economic associations, own the local distribution grids.

- 3.3.1.2 In general, the dominating flow of power in the national transmission grid is from the north, where less expensive hydropower is predominantly produced and the population density is low to the south, where electricity consumption is high. SvK applies a spot tariff on the national grid.
- 3.3.1.3 The connections from north to the south are characterised by certain bottlenecks, the most important being between Northern and Central Sweden and between Central and Southern Sweden. SvK is under an obligation to secure the supply of electricity and power in the grid and the entire system effectively. Operating the system, SvK has chosen to solve bottlenecks in Sweden by counter-purchases instead of different internal price areas as e.g. in Denmark or Norway. If the transmission capacity of the national grid is insufficient to transmit the electrical energy to meet the actual demand, SvK uses counter-purchase as a method to reduce the physical energy flow on the grid, without affecting the trade of customers. However, it is quite costly to maintain one price area by counter purchase only.
- 3.3.1.4 SvK is responsible for the transmission system, which is owned by the state. Thus, SvK is responsible for securing supply of power i.a. by maintaining the balance between production and consumption in all parts of the country. As also mentioned above in 3.1.2 SvK owns Nord Pool together with Statnett and SvK owns Nord Pool Spot together with the Nordic TSOs in Denmark, Norway and Finland.
- 3.3.1.5 The responsibility of the transmission system includes administration of the national electrical grid of 220 kV and 400 kV lines plus installations, interconnections to neighboring countries and IT systems.

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<sup>7</sup> Cf. the EC Commission's press release IP/05/1706.

Sweden is geographical situated in a way so the country is interconnected to all the other Nordic countries in the Nord Pool spot market. SvK owns the Swedish sections of the links to Norway, Finland and DK1, and owns the interconnection to DK2 (Øresundsforbindelsen) partly with Energinet.dk.

Furthermore, Sweden is also interconnected to Germany and Poland, by way of the Baltic Cable and the SwePol Link respectively. The 600 MW Baltic Cable is owned by E.ON (1/3 of the shares) in Sweden and "Statkraft Energi AS" (2/3 of the shares) and the SwePol Link is owned by SvK (with 51%) together with two other companies..

### 3.3.2 Power production in Sweden

3.3.2.1 The Swedish electricity market is characterised by few undertakings with large market shares. The companies are Vattenfall, Fortum Kraft, Skellefteå Kraft and E.ON.

3.3.2.2 In countries with thermal power-based systems – as in Denmark – the capacity of the power plants determines how much electricity can be generated. The energy sources on which electricity generation in thermal power countries is based (oil, coal, natural gas and uranium), can generally be acquired in whatever quantities are needed, and do not limit power production. However, it is expensive to build thermal power plants to meet short-term peaks in demand, and it is both time-consuming and costly to adjust production up and down in existing thermal power plants. But thermal power plants can deliver relatively inexpensive electricity if this type of plants delivers to supply basis load, i.e. in a continuous period over a longer time.

In hydropower-based systems – as in Sweden – the limiting factor is the quantity of water available. Electricity generation by hydropower plants can be adjusted up and down rapidly and at low cost to meet short-term fluctuations in consumption or unexpected changes in power supplies. The variable production costs are lowest for hydropower as the water, which is used for power production is free and in general there are no – or less – costs to environmental duties and taxes.

3.3.2.3 The production of power in Sweden is mainly based on nuclear and hydropower production. The hydropower production is placed at the rivers and water reservoirs in the Northern Sweden. However, Sweden also has power plants, which produce thermal power based on conventional fossil fuels, e.g. oil and gas. One of these power production plants is situated near Karlshamn in Southern Sweden. This plant supports the demand for power in situations where the price is higher than average, e.g. when bottlenecks occur in one of the neighbouring areas – e.g. in Northern Sweden, Denmark, Germany or Poland.

In the past few years, the earlier surplus generation capacity in Sweden has been reduced. Especially the balance in Southern Sweden has become more restraint as e.g. the nuclear reactors in Barsebäck have been shut down and the Swedish consumption of electricity has increased.

- 3.3.2.4 Trade reduces the need for costly adjustment of thermal plants, because excess supply of electricity can be exported and in case of a shortage of supply electricity can be imported. Power trade between countries is determined by production and consumption patterns in each country, in addition to the capacity of the transmission network linking countries and the conditions for its use. One basis for power trade is the opportunity for mutual benefits deriving from differences in the production systems of different countries. Power exchange between the Nordic countries makes use of the advantages to be gained from interconnecting hydropower and thermal power systems.

4. THE LEGAL FRAMEWORK REGULATING SVENSKA KRAFTNÄT'S ACTIVITIES

4.1 The general principles in the EC Treaty regarding the Internal Market

The main purpose with the EC Treaty is to establish an Internal Market within the EC where goods, people and services can flow across borders to every Member State in a free and non-discriminated way. Following this purpose any restrictions – direct or indirect, actual or potential – are in general prohibited and can only be accepted in strict situations. The Treaty shall also provide for free competition within the EC as a further tool to enhance the functioning of the internal market. Based on these main principles the EC Treaty contains several articles expressing and defining the framework of this Internal Market.

Article 12 of the EC Treaty defines the basic prohibition against discrimination on the basis of nationality as follows:

*"Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".*

Regarding SvK's regulation of Øresundsforbindelsen, Articles 28 and 29 of the EC Treaty are of interest, establishing the principle of free movement of goods:

*"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States".*

These articles express the key principles behind the Internal Market.

These basic principles have further been implemented into the energy sector by specific EC legislation. Thus, Regulation EC No 1228/2003, Directive 2003/54/EC and earlier Directive 96/92/EC are specific executions of these principles on the European electricity market. Therefore, when interpretations of the applicable EC legislation and national implementations have to be made account shall always be taken to the underlying principles.

4.2 EC Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity (the CBT Regulation)

A Regulation is per se directly applicable and form part of national law in each member-state, cf. Article 249 (2) of the EC Treaty.

The purpose of the CBT Regulation is stipulated in the Regulation's article 1:

*"The regulation aims at setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal electricity market, taking into account the specificities of national and regional markets...."*

In article 6 of the CBT Regulation, the general principles of congestion management are established. The principles are the following:

*"Article 6....*

*1. Network congestion problems shall be addressed with non-discriminatory market based solutions which give efficient economic signals to the market participants and transmission system operators involved. Network congestion problems shall preferentially be solved with non transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.*

*2. Transaction curtailment procedures shall only be used in emergency situations where the transmission system operator must act in an expeditious manner and redispatching or countertrading is not possible. Any such procedure shall be applied in a non-discriminatory manner ...*

*3. The maximum capacity of the interconnections and/or the transmission networks affecting cross-border flows shall be made available to market participants, complying with safety standards of secure network operation.*

*4. Market participants shall inform the transmission system operators concerned a reasonable time ahead of the relevant operational period whether they intend to use allocated capacity. Any allocated capacity that will not be used shall be reattributed to the market, in an open, transparent and non-discriminatory manner.*

*5. Transmission system operators shall, as far as technically possible, net the capacity requirements of any power flows in opposite direction over the congested interconnection line in order to use this line to its maximum capacity. Having full regard to network security, transactions that relieve the congestion shall never be denied.*

*..."*

The CBT Regulation sets out the legal framework for how the TSOs can act when it comes to network congestion problems. The keywords are that the TSOs must use non-discriminatory and market efficient solutions. In accordance with this it is also

stipulated in the guidelines to the CBT Regulation, under the section about *"principles governing methods for congestion management"*, that:

*"The possible merits of a combination of market splitting, or other market based mechanisms, for solving "permanent" congestion and counter-trading for solving temporary congestion shall be immediately explored as a more enduring approach to congestion management."*

In the most recently proposed amendment to the guidelines of 8 June it is stipulated in subsection 1.7 that:

*"When defining appropriate network areas in and between which congestion management is to apply, TSOs shall be guided by the principles of cost-effectiveness and minimisation of negative impacts on the Internal Electricity Market. Specifically, TSOs may not limit interconnection capacity in order to solve congestion inside their own control area, except for the above mentioned reasons and reasons of operational security<sup>8</sup>. If such a situation occurs, this shall be described and transparently presented to all the users by the TSOs. ..."*

The behaviour of SvK is clearly a violation of the Regulation which may also be confirmed by the interpretation used in the coming guidelines. Thus, SvK violates the Regulation by its behaviour today since the guidelines do not change the law but merely express a common understanding of the law. There is no doubt that the reason for restricting Øresundsforbindelsen in the many cases has not been due to security of supply reasons but in order to lower costs to counter purchase and keep the spot price low in Sweden. It is also submitted that there has been a constantly net loss for the relevant internal market and the players and consumers connected to the behaviour of SvK. As [Annex 9](#) is enclosed a memo in which some of the losses are quantified.

4.3 Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (the Electricity Directive)

Article 2 (4) of the Electricity Directive defines a TSO as<sup>9</sup>:

*"...a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a*

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<sup>8</sup> According to footnote 2 of the guidelines operational security means "keeping the transmission system within agreed security limits".

<sup>9</sup> This definition is also adopted in the CBT regulation (1228/2003), see article 2 in the Regulation.

*given area and, where applicable, its interconnections with other systems, and for ensuring the long term ability of the system to meet reasonable demands for the transmission of electricity”.*

No TSO, which cover the entire EU, exists. In fact, each country has its own TSO, and thus the legal status and tasks of the TSOs differ slightly from country to country. However, the definitions and tasks set out in the Electricity Directive and the CBT Regulation are minimum requirements applying to all TSOs within the EU.

*“TSOs are responsible for the bulk transmission of electric power on the main high voltage electric networks. TSOs provide grid access to the electricity market players (i.e. generating companies, traders, suppliers, distributors and directly connected customers) according to non-discriminatory and transparent rules. In order to ensure the security of supply, they also guarantee the safe operation and maintenance of the system. In many countries, TSOs are in charge of the development of the grid infrastructure too. TSOs in the European Union internal electricity market are entities operating independently from the other electricity market players<sup>10</sup>”.*

Articles 9-12 of the Electricity Directive address the TSO's tasks, the unbundling requirements, the rules on dispatch and balancing and the rules on confidentiality. For the purpose of this memorandum Articles 9 and 11(2) are of relevance:

Article 9:

*“Each transmission system operator shall be responsible for:*

- a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;*
- b) contributing to security of supply through adequate transmission capacity and system reliability;*
- c) managing energy flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services insofar as this availability is independent from any other transmission system with which its system is interconnected;*
- d) providing to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient*

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<sup>10</sup> This definition is set out on The European Transmission System Operator Organization's webpage <http://www.edi.etso-net.org/>

*operation, coordinated development and interoperability of the interconnected system;*

*e) ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings;*

*f) providing system users with the information they need for efficient access to the system”.*

Article 11(2):

*“The dispatching of generating installations and the use of interconnectors shall be determined on the basis of criteria which may be approved by the Member State and which must be objective, published and applied in a non discriminatory manner which ensures the proper functioning of the internal market in electricity. They shall take into account the economic precedens of electricity from available generating installations or interconnector transfers and the technical constraints on the system.”*

In the Electricity Directive’s preamble recitals 6 and 7 it is stated that:

*“For competition to function, network access must be non-discriminatory, transparent and fairly priced”.*

*“In order to complete the internal electricity market, non-discriminatory access to the network of the transmission or the distribution system operator is of paramount importance”.*

#### 4.4 Chapter 8 of the Swedish Electricity Act

4.4.1 In Sweden, the system responsibility is regulated in chapter 8 of the Swedish Electricity Act<sup>11</sup>, which is an implementation of the Electricity Directive (2003/54/EC).

According to section 1, paragraph 1 of chapter 8 of the Swedish Electricity Act:

*“The authority appointed by the government for this purpose shall be given system responsibility for electricity.*

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<sup>11</sup> “Ellagen (1997:857)”, which was issued on 20 November 1997. For the sake of completeness it should be stressed that the following sections contains unauthorised translations from Swedish legislation into English. Furthermore, we are responsible of the underlining of sentences.

*System responsibility for electricity refers to the overall responsibility to coordinate the operation of the electricity plants so as to ensure the safety of the operations and ensure that balance, either within the country as a whole or within parts of it, is maintained in the short-run between the generation and consumption of electricity”.*

4.4.2 Since 1 January 1995 SvK has been designated as the authority with system responsibility<sup>12</sup>, i.e. the Swedish TSO, cf. above in 3.3.1. SvK has the central responsibility for ensuring that electricity plants cooperate in a manner ensuring the reliability of service so that a balance is maintained in the short term between the production and the consumption of power both within the country as a whole and within parts of it (system responsibility).

4.4.3 SvK is a so-called governmental “Affärsverk”, which is a wholly state-owned company. The government has general instruction power over the company, e.g. through “förfordningar”. Decisions are made subject to the Public Administration Act and Act on the Access to Records. SvK may therefore be characterized as a state utility.

*“Since Svenska Kraftnät is a state utility, it gets its instructions directly from the Government in decrees and in special assignments. In general, the monitoring that Svenska Kraftnät carries out its tasks in an acceptable way is done in the same way as other authorities are supervised”<sup>13</sup>.*

4.4.4 In section 2, paragraph 1 of chapter 8 of the Swedish Electricity Act it is stated that;

*“The authority on which system responsibility rests may, to the extent required to exercise this system responsibility, order the electricity generators to increase or decrease power generation, paying them a market-based remuneration”.*

This section gives SvK the power to issue direct orders to producers to increase and decrease production rapidly in order to keep the balance of the system. If necessary SvK can also issue orders to decrease electricity consumption. Furthermore, SvK has also been given the right to stipulate the technical requirements, the reliability requirements etc. for production plants and networks.

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<sup>12</sup> Cf. Section 1 in the ministerial order “förfordning (1994:1806)”.

<sup>13</sup> Cf. NordREG report 3/2006 “Development of a common Nordic balance settlement” p. 23., as enclosed as Annex 4.

4.4.5 In section 2, paragraph 2 and 3 of chapter 8 of the Swedish Electricity Act it is stated that;

*"If system responsibility cannot be exercised with the help of measures referred to in the first paragraph, the authority on which system responsibility rests may, to the extent required to exercise this system responsibility, order holders of network concessions to limit or interrupt the supply of power to consumers. The limitation and interruption of the power supply shall be effected equitably, to the extent permitted by system responsibility. At the same time the duties of the concessionaire regarding supply security should also, as far as is possible, be taken into account".*

*"The government is to pass further instructions on the powers of the authority on which system responsibility rests..."*

These sections give the government the right to set out instructions for the TSO. The government has used this delegation to pass "förordning om systemansvaret för el (1994:1806)" and "förordning med instruktion för Affärsverket Svenska Kraftnät (1991:2013)". In these ministerial orders, it is among other things stated that SvK has the system responsibility in Sweden.

4.4.6 In section 1 of the ministerial order "förordning (1991:2013)" it is stated that;

*"Svenska Kraftnät is responsible for managing, developing and operating Sweden's national grid and overseas links in an economically efficient and environmentally responsible way. Svenska Kraftnät is also in charge of selling transmission capacity".*

In section 2, subsection 1-3, 5 and 10 respectively of the same ministerial order it is stated that:

*"Svenska Kraftnät must also..."*

*"1. develop the country's electricity grid in a cost-efficient and socially responsible way"*

*"2. enhance competition on the electricity and natural gas market"*

*"3. increase research in and development and demonstration of new technologies of importance to the company..."*

*"5. export services in its business area ..."*

*"10. be in charge of supervising the security of supply in the national electricity grid in accordance with the Swedish Electricity Act (1997:857) and "förordning (1994:1806)".*

Thus, SvK's assignments are pursuant to the "förordning (1991:2013)" to develop the national transmission grid based on socially efficient considerations, enhance competition in the electricity market, increase research in and development and demonstration of new technologies, and supervise the security of supply.

SvK has in accordance with this on their webpage stated their mission to:

*"provide transmission of power on the national grid well in compliance with security, efficiency and environmental requirements, perform the system operator function for electricity and natural gas in a cost-efficiently way, promote an open and competitive Swedish, Nordic and European electricity and natural gas market, to ensure a robust nationwide supply of electricity<sup>14</sup>".*

4.4.7 Thus SvK's main tasks can on the basis of the EU and the Swedish regulatory legislation be summed up as follows:

- Enhancing competition and ensuring non-discrimination on the internal electricity market. Congestion problems shall be addressed with non-discriminatory market based solutions, which give efficient economy signals to the market and preferentially be solved with non-transaction based methods.
- Responsible for the bulk transmission of electric power and provide access to the grid according to non-discriminatory and transparent rules.
- Coordinating the operation of the electricity plants so they will ensure the safety of the operations and ensure the supply of power in Sweden i.a. by maintaining the balance between the generation and consumption of electricity is maintained throughout the country.
- Managing, developing and operating Sweden's national transmission grid and overseas links (interconnections) in an economically efficient and environmentally responsible way – i.e. the regulation of the transmission system has to be based on security of supply and operational reasons. SvK has the exclusive power in Sweden to regulate the transmission grid including the interconnection across

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<sup>14</sup> Cf. Svenska Kraftnät's homepage <http://www.svk.se>

Øresund and other interconnections to and from Sweden. Thus, SvK is active on the separate market for transmission.

- The use of interconnections shall be determined on the basis of criteria, which must be objective, published and applied in a non-discriminatory manner, which ensures the proper functioning of the internal market in electricity.
- Ensuring the ability of the electricity system to meet the demands for the transmission of electricity.
- Contributing to security of supply through adequate transmission capacity and system reliability.
- Managing energy flows on the system, including exchanges with other interconnected systems, e.g. Denmark.

It does not appear from the legal framework that it is a task of SvK to pursue financial or economic goals such as limiting own costs pertaining to counter purchases at the expense of the market and consumers, and manipulating the spot price in Sweden to discriminate Swedish consumers positively at the expense of e.g. Danish consumers.

5. THE COMPETITION RULES GOVERNING SVENSKA KRAFTNÄT'S ACTIVITIES

5.1 In addition to the general regulatory requirements applying to the energy sector, the EU competition rules and the Swedish Competition Act also apply to the activities of SvK. Of special interest in this connection is Article 82 of the EC Treaty prohibiting the abuse of a dominant position. For the purpose of determining whether an undertaking is dominant, it is necessary to identify the relevant market.

5.2 The relevant market is the internal EU electricity market and not only Sweden. Sweden is an EU member state and the Swedish national legislation regarding transmission is an implementation of the EU directive and the principles of the EC Treaty as described above in section 3. Furthermore, the CBT Regulation is directly applicable in Sweden as described above in section 4. The relevant markets seen from a demand and supply substitutability perspective is EU and an unbroken chain of EU regions and not only Sweden. SvK is therefore in breach of both the legal framework for SvK and Article 82 per se if it regards Sweden as the relevant market for its obligations and powers.

5.3 Further, there is an EU or EU regional market for trade in electricity. SvK is not active on this market as such, but is in its capacity of TSO a necessary pre-requisite for the functioning of this internal electricity market, and SvK's behaviour affects this market. The overall relevant market is the market for transmission of electricity in Sweden and to the countries near Sweden - i.e. all Nordic countries, the Baltic countries and Germany. This is in line with case law, e.g. the Commission's decision in Sydkraft/Gräninge<sup>15</sup>. On this overall market SvK possess a dominant position due to the exclusive power to regulate transmission as the Swedish TSO. It could further be argued that a separate relevant market in this case is the market for transmission of electricity across Øresund, i.e. through Øresundsforbindelsen exists, as there is no real alternative way of regulating the transmission of electricity between DK2 and Sweden. It is submitted that the fact that electricity may only be transmitted from Sweden to DK2 and vice versa through the interconnection across Øresund means that Øresundsforbindelsen constitutes a separate market for the transmission of electricity and possibly also an essential facility.

5.4 The Commission has previously confirmed this last reasoning in its decisions in 94/19/EC – "Sealink and Holyhead", and 94/119/EC – "The port of Rødby".

In 94/119/EC – "The port of Rødby" – the Commission stated that:

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<sup>15</sup> Case no COMP/M.3268 Sydkraft/Gräninge.

*“The relevant market is the market for the organization of port services in Denmark for ferry services operating on the Roedby-Puttgarden route (passengers and vehicles).... This is due to the fact that operators wishing to provide a transport service on a given sea route must have access to the port facilities located at both ends of the crossing in order to attain their objective. In the case in question, there is no real alternative with the same advantages as those offered by the port of Roedby for sea transport between eastern Denmark, on the one hand, and Germany and the rest of western Europe, on the other”.*

The same applies to SvK (and of course all other TSOs) as SvK provides transmission capacity on a given interconnection, in this case Øresundsforbindelsen, and users – whether distributors or traders – in Denmark have to use this interconnection in order to perform their task without having any alternative.

- 5.5 Being an undertaking and a statutory monopolist engaged in operations in the electricity sector, SvK is subject to Article 82 EC, cf. Article 86(2). It follows from Article 86(2), that a statutory monopolist must comply with Article 82, unless such compliance will prevent the undertaking from performing its tasks.
- 5.6 According to settled case-law in Community competition law the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed<sup>16</sup>. Further to being a state utility SvK is indeed engaged in economic activities as SvK e.g. owns and manages the interconnections between the countries surrounding Sweden and e.g. charges a fee for administrations. Thus, SvK has economical influence in the Electricity Market and its behaviour affects both the free market of electricity and transmission in this matter. Furthermore, it has previously been confirmed by the Commission that a TSO is an undertaking for competition law purposes and thus is subject to Article 82 of the EC Treaty, cf. below in section 5.12 mentioning the UK-French electricity interconnection.
- 5.7 Article 82 prohibits any behaviour which restricts competition and which is not objectively and reasonably justified. An undertaking which has been granted exclusivity is not allowed to use the exclusive rights to hamper competition unless this is necessary to perform its tasks. Furthermore, discrimination may also per se amount to abuse of a dominant position on its own.

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<sup>16</sup> See e.g. C-41/90 "Höfner og Elser", the joint cases C-159/91 and C-160/91 "Poucet and Pestre", C-55/96 "Job Centre",

- 5.8 Fundamentally, an undertaking, which has been granted exclusive rights, must seek only the objectives set out in the legal framework granting the exclusive rights. Seeking other objectives would not be founded under the legal framework and constitutes therefore also an abuse of the dominant position the undertaking holds.
- 5.9 It is further established in EC competition law that a TSO is subject to Article 82. Thus – as any other undertaking – TSOs may not unnecessarily restrict access to e.g. an interconnection.

*"An undertaking in a dominant position as network operator is limited by Article 82 in its freedom to restrict access to a third-party. Specifically, it is limited when: .... there are capacities available...."<sup>17</sup>."*

*"....the transmission or distribution undertaking has an obligation to open the network to third parties and third parties have a right to obtain access to a network as a result of Article 82 EC"<sup>18</sup>."*

- 5.10 An example of illegal discrimination, which is also contrary to the most fundamental principles of the EC Treaty, is discrimination on the basis of nationality. Pursuant to Article 12 of the EC Treaty, it has been established several times that discrimination on grounds of nationality constitutes abuse of a dominant position.

This is the case where a dominant undertaking discriminates for the purpose of gaining an additional and unfair economical advantage due to difference of price in the different member states and attempts to limit trade between the member states.

- 5.11 It constitutes an abuse if the main purpose of the discrimination is to favour customers or citizens in ones own country even if there is no immediate financial gain connected with this practice. In this case there is indeed a financial gain because the practice is conducted by SvK in order to reduce the costs pertaining to counter purchases.

Cases such as the Commissions decision in 95/364 of 28 June 1995 regarding Brussels Airport and IV/35.703 of 10 February 1999 regarding Portuguese and Spanish Airports (as confirmed by the ECJ in C-163/99 of 29 March 2001 in Commission vs. Portugal) clearly indicate that discrimination on the basis of nationality constitutes abuse of a dominant position.

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<sup>17</sup> Cf. p. 232 in Peter Cameron's "Competition in Energy markets" 2002.

<sup>18</sup> Ibid. p. 233.

- 5.12 The European Commission has on different occasions looked into the behaviour of TSOs in the light of EC competition law.

In a case regarding the UK-French electricity interconnection, the TSOs in UK and France asked for the Commission's view on the interconnection linking UK and France before entering into a new contract for the management and allocation of capacity on the submarine cable between the countries across the British Canal. The Commission stated that:

*"any restrictions on the attribution of transmission rights or discriminatory treatment would have been contrary to EU-competition law, as it would have amounted to a potential abuse of dominant position"<sup>19</sup>.*

Following the Commission's opinion, the TSOs decided to open up access to the interconnection, without any capacity being reserved for any particular company.

- 5.13 The Court investigated different infringements of EC competition law in the case C-393/92<sup>20</sup>, involving different Dutch electricity companies.

In this case, the Court ruled that:

*"Article 86 (now Article 82) of the Treaty precludes the application, by a regional electricity distributor where it belongs to a group of undertakings occupying a collective dominant position in a substantial part of the common market, of an exclusive purchasing clause contained in the general conditions of sale which prohibits a local distributor from importing electricity for public supply purposes and which, in view of its economic and legal context, affects trade between Member States"<sup>21</sup>.*

- 5.14 In conclusion it is submitted that SvK abuses its dominant position by restricting transmission through Øresundsforbindelsen for reasons it is not allowed to take into consideration under applicable law e.g. by making a gain for itself by lowering the costs connected to counter purchase and manipulating the spot price in Sweden by restricting transmission out of Sweden. The behaviour also constitutes an abuse in the form of dis-

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<sup>19</sup> Cf. in the Commission's press release IP/01/341.

<sup>20</sup> The Court's judgment of 27 April 1994 in Municipality of Almelo and others vs. NV Energiebedrijf Ijsselmij.

<sup>21</sup> Cf. p. 7 in C-393/92.

crimination of the Swedish players and consumers to the disadvantage of the players and consumers on the relevant markets outside Sweden.

6. SVENSKA KRAFTNÄT'S BEHAVIOUR ON THE ØRESUND INTERCONNECTION

6.1 The general submission as regards Svenska Kraftnät's behaviour and administration of the regulation of power transmission through the Øresund interconnection

6.1.1 Sweden operates with only one price area at the Nord Pool exchange as determined by SvK. This is in contrast to Denmark, which is divided into DK1 and DK2, and in Norway, which is divided into NO1 and NO2 and - in some situations - even in more price areas in order to handle the flow. In Sweden, the demand for electricity is greatest in the areas with the highest population density i.e. in the Middle and Southern part of Sweden. On the other hand, cheap hydropower is supplied in the Northern part of Sweden where the population density is low. Generally, electricity flows from the Northern part to the Southern part of Sweden due to the cheap hydropower in the North and the greater demand and more expensive production capacity in the South.

In general there is a need to transmit hydropower from Northern Sweden and Norway to Southern Sweden.

6.1.2 The interconnections in Sweden are – like all interconnections and as described above in 3.1.7 – limited and in many periods there is not enough capacity to both meet the demand in Southern Sweden and at the same time export power to e.g. DK2, Germany or Poland. If SvK allowed exports to DK2 to meet the demand and the higher price in DK2 (and thus Southern Sweden), this would benefit the Swedish producers of power and the Danish electricity traders and consumers, but also make the price go up in Southern Sweden, since the demand, including exports to DK2, cannot be met by transmission from Northern Sweden. Thus, in these situations by restricting transmission through Øresundsforbindelsen SvK causes the loss for the Danish consumers, the electricity producers in Sweden and the retailers in Denmark. Retailers and producers also suffer a loss due to the fact that they cannot foresee when the connection capacity is reduced. Thus, traders are not able to manage their risk in a proper way. Therefore, the behaviour of SvK causes an uncertainty that damages not only the consumers but also the retail electricity market. The producers suffer because SvK's random behaviour adds an uncertainty to the market. Economically, uncertainty is always a cost factor.

6.1.3 SvK has through Nord Pool defined and wishes to maintain one single price area in Sweden. To pursue this policy, SvK has to solve the problem with the bottlenecks from North to South in Sweden by counter purchase. However, it is quite costly to maintain one price area through counter purchases, and therefore SvK prohibits or reduces exports of power if export could lead to price increases in Southern Sweden even though

the reduction of capacity in Øresundsforbindelsen is not done in order to secure supply. Thus, it is submitted that SvK restricts electricity exports from Sweden to DK2 through Øresundsforbindelsen in order to reduce the need for and thereby the costs connected to counter purchases when bottlenecks occur between Northern and Southern Sweden. Besides keeping one price area it is submitted in addition that the administration is an objective of keeping an artificial low spot price on electricity in Sweden and a minimization of expenditures on counter purchase. The result of this administration of the interconnection is higher prices in Denmark and Sweden's other neighbouring countries than would have been the case in a free market.

- 6.1.4 As a result of the intensive transmission of electricity between DK2 and Sweden, the spot price in the DK2 price area normally reflects the Nordic price level at the Nord Pool exchange. However, SvK's policy to maintain one single price area in Sweden has in general resulted in a reduction of trading capacity on Øresundsforbindelsen as a result of SvK's handling of and reactions to internal Swedish bottlenecks. Instead of maintaining the single price area in Sweden by making counter purchases, SvK reduces the transmission capacity, which has no cost for SvK and thus is a more economic solution for SvK and the Swedish consumers. However, such an administration of internal bottlenecks will cause the price formation in DK2 to be disconnected from the Nordic market.
- 6.1.5 In recent monthly reports produced by the Danish TSO Energinet.dk regarding the market in general and other statistics it is documented that SvK lately has reduced the trade capacity between DK2 and Sweden more frequently than in previous years.

*"The number of hours with a reduction of the import trade capacity on the Øresund connection increased from 9% in 2004 to 39% in 2005. In the fourth quarter of 2005 alone, the trade capacity was reduced 67% of the hours<sup>22</sup>"*

- 6.1.6 Some of the more severe examples - besides 28 and 29 November, cf. 6.2 below - occurred i.a on. 5, 6, 17 and 18 October 2005<sup>23</sup>, on 16, 22, 23 and 31 November 2005<sup>24</sup>, on 12, 13, 19 and 21 December 2005<sup>25</sup>, and on 9, 25, 26 and 27 January 2006<sup>26</sup> but the tendency is general. Regarding the level of the reduction, Energinet.dk has concluded that

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<sup>22</sup>"Markedsrapporten Nr. 4 – Januar 2006", enclosed as [Annex 5](#), p. 1.

<sup>23</sup>"Markedsrapporten Nr. 1 – Oktober 2005", enclosed as [Annex 8](#), p. 5.

<sup>24</sup>"Markedsrapporten Nr. 2 – November 2005", enclosed as [Annex 7](#), p. 5.

<sup>25</sup>"Markedsrapporten Nr. 3 – December 2005", enclosed as [Annex 6](#), p. 5.

<sup>26</sup>"Markedsrapporten Nr. 4 – Januar 2006", enclosed as [Annex 5](#), p. 5.

*"In a few of the hours, the trade capacity was reduced to as little as 15% of the usual capacity of 1,300 MW<sup>27</sup>".*

- 6.1.7 Based on an analysis of the situation on Øresundsforbindelsen in the fourth quarter of 2005, it should be stressed that SvK in a number of cases – and thus more for internal reasons than for reasons of security of supply – has reduced the trade capacity on Øresundsforbindelsen significantly, without this being justified by security of supply or operational reasons, since there was at the same time free production capacity in the Southern part of Sweden, which is confirmed by Energinet.dk:

*"The market was characterized by high spot prices on the Western side of the Øresund interconnection. At the same time, there was idle trade capacity on the interconnection (from east to west) and idle operational production capacity on the Eastern side of the interconnection<sup>28</sup>".*

- 6.1.8 In these situations, DK2 has thus been disconnected from the price mechanism on the Nordic spot market, and has consequently experienced spot prices that were substantially higher than in Sweden without reasons in the securing of supply or operational reasons in Sweden, which is proved by the fact that e.g. the plant in Karlshamn in general has idle production capacity, cf. below 6.2.2. Further, the objective data shows that after the spot market has closed there have in a number of cases been a considerable export of electricity produced on the Karlshamn plant through the Baltic Cable. In all these cases the actual exported capacity has been vastly more than set by SvK in connection with the spot market. By analyzing the differences between the announced trading capacity and the actual trade on the Baltic Cable in January to March 2006 it can be concluded that in approximately 50% of the period the actual trade exceeded the announced capacity and that in approximately 30% of this time the exchange exceeded more than 10 MW, cf. [Annex 9](#).

- 6.1.9 It is submitted that SvK pursues the policy of maintaining one single Swedish price area. However, bottlenecks in the transmission lines from North to South in Sweden necessitate counter purchase if one single price area is to be maintained. It is further submitted that SvK restricts electricity exports from Sweden to Denmark through Øresundsforbindelsen in order to reduce the need for counter purchases because counter purchase is costly. Where SvK reduces capacity on Øresundsforbindelsen and the Karlshamn plant in Southern Sweden has at the same time spare capacity, the reduction of transmission capacity cannot be based on security of supply or operational

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<sup>27</sup>"Markedsrapporten Nr. 2 – November 2005", enclosed as [Annex 7](#), p. 1.

<sup>28</sup>"Markedsrapporten Nr. 3 – December 2005", enclosed as [Annex 6](#), p. 1.

reasons. Thus, the reason must be economic, i.e. the reduction of transmission capacity must serve to reduce the costs pertaining to maintaining one price area through counter purchases. The restriction of export of electricity has the effect that production capacity in Southern Sweden on plants with relatively high operating costs do not come in to the spot market and the spot price is kept at an artificially low point. On this basis it is submitted that SvK seeks to avoid counter purchase and keep the spot price in Sweden as low as possible. The restriction reduces the total need for counter purchases, and at the same time a low spot price keeps the costs pertaining to counter purchases low, since the price paid in counter purchases is based on the spot price.

- 6.1.10 In normal circumstances, electricity will be allocated to the markets paying the highest prices, but it becomes problematic, when the allocation leads to a segregation of the electricity market, and unequal and discriminatory access to the transmission system.

We are of the opinion that SvK obstructs the principles of an open and transparent electricity market, when it restricts the trade capacity on Øresundsforbindelsen and at the same time indirectly precludes the production capacity in Southern Sweden, e.g. on the plant in Karlshamn to become a part of the spot market. The restriction of capacity to save costs in connection with counter purchases and price manipulation on Nord Pool constitutes an abuse of SvK's dominant position as it is based on illegal and unreasonable objectives and discriminates market players and consumers outside Sweden.

- 6.2 Svenska Kraftnät's administration of Øresundsforbindelsen on 28 and 29 November 2005

- 6.2.1 Administration of the interconnection

- 6.2.1.1 On 28 and 29 November 2005, Eastern Denmark (DK2) experienced extremely high spot prices. DK2 was separated from the Nordic price level in hour 7 to hour 21 both days. Instead of following the Nordic price level, the prices harmonized with the prices in the Kontek price area in Northern Germany.

- 6.2.1.2 In the hours 18 and 19 on 28 November 2005, prices boomed to more than 13,000 DKK/MWh in the hour 18 and just under 9,000 DKK/MWh in the hour 19. On 29 November 2005, the price increased to approximately 5,000 DKK/MWh in the hour 18. By way of comparison, average prices are normally approx. 250 DKK/MWh in the Nordic countries, which Denmark usually follows and as described is a part of.

- 6.2.1.3 All this happened despite the fact that there was idle trading capacity on Øresundsforbindelsen and idle production capacity in Southern Sweden on the

Karlshamn plant. In DK2, all available production capacity was in operation in the spot market.

- 6.2.1.4 The Danish TSO Energinet.dk has issued a specific report on the events<sup>29</sup>. The report gives the following reasons for the extremely high prices in DK2 on 28 and 29 November 2005.

*“Overall, the extreme spot prices in Eastern Denmark are attributable to two factors, i.e., 1) a Swedish desire to keep Sweden as one price area, which led to reductions in trading capacity on the Øresund interconnection and thereby a critical power balance in Eastern Denmark, and 2) a lack of liquidity in the new Nord Pool price area Kontek in Northern Germany<sup>30</sup>.*

...

*The import trading capacity on the transmission lines between Eastern Denmark and Sweden was severely reduced by Sweden throughout November. During those critical hours down to approx. 20% of the normal capacity of 1300 MW. The reason for this is a Swedish (political) desire to keep Sweden as one price area<sup>31</sup>.*

...

*As the aim is for Sweden to remain one price area without the use of countertrade, Svenska Kraftnät may choose either to handle such internal congestion or to reduce consumption in Southern Sweden or to reduce the exchanges. Svenska Kraftnät thus chooses to reduce trading capacity and thereby exchanges to create a balance in Sweden<sup>32</sup>.*

...

*The management of internal congestion by means of a reduction in export trading capacity (seen from the Swedish side) on, for example, the Øresund interconnection, ensures that Sweden can be preserved as one price area. Svenska Kraftnät's ex ante assessment of the power balance for the coming 24-hour period resulted in a very low export trading capacity on the Øresund interconnection on 28 November. The trading capacity on the Nordic transmission lines greatly impact the spot prices. Consequently, the Karlshamnverket power station's offer was not accepted in the spot market*

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<sup>29</sup> See the report from Energinet.dk “Report on price formation in November 2005 in Eastern Denmark”, enclosed as [Annex 3](#). For the sake of completeness it should be mentioned that the following sections might contain some unauthorised translations from Danish to English from the report.

<sup>30</sup> [Annex 3](#), p. 5.

<sup>31</sup> [Annex 3](#), p. 6.

<sup>32</sup> [Annex 3](#), p. 11.

*despite the fact that the power balance was critical in Southern Sweden. Svenska Kraftnät does not include the Karlshamnverket power station in calculations of the expected power balance. This results in a lower trading capacity on the Øresund interconnection than needed. At the same time the spot price in Sweden becomes too low to operate the power station in a profitable way<sup>33</sup>.*

...

*In the Kontek price area a very high sales bid was submitted. The reduced trading capacity on the Øresund interconnection - and thereby reduced supplies from Sweden – meant that this Kontek bid was activated and thus became price-setting in Eastern Denmark. Moreover, little wind power production and a breakdown at the Avedøreværket power station restricted production capacity in Eastern Denmark<sup>34</sup>.*

...

*It has been seen that the practice has not been changed after the situation on 28 November, despite Energinet.dk's call for a change<sup>35</sup>”.*

- 6.2.1.5 The report has been prepared following a letter of 3 January 2006 from SvK to Energinet.dk, in which SvK suggests a solution for the elimination of bottlenecks on Øresundsforbindelsen by creating one Nord Pool price area consisting of Sweden and DK2. According to this letter<sup>36</sup>:

*“Despite this, situations may occur where the wanted trading capacity to particularly Southern Sweden cannot always be obtained if no other actions are taken.*

*Thus, there were concerns that the trading capacity to the Southern part of Sweden could be limited, and that this area could experience situations with lacking competition in the electricity market. We found that the problem could best be solved by the use of so-called counter trade by Svenska Kraftnät to ensure that Sweden always constitutes one price area in Nord Pool. In this way, the price area will be large enough to ensure effective competition.”*

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<sup>33</sup> Annex 3, p. 12.

<sup>34</sup> Annex 3, p. 1.

<sup>35</sup> Annex 3, p. 12. This statement has been confirmed through the monthly reports from Energinet.dk referred to above in section 6.1.6 and enclosed as Annexes 5-8.

<sup>36</sup> The letter is a part of the report and thus also included in Annex 3.

It is our view that the events taking place on 28 and 29 November 2005 prove SvK's strategy of maintaining one single price area in Sweden at any cost. This view is strongly supported by the fact that the plant in Karlshamn had spare capacity in Southern Sweden at the same time, cf. just below.

## 6.2.2 Spare capacity in Southern Sweden

### 6.2.2.1 In relation to the Karlshamn plant and the spot market in general, an interesting phenomenon has been observed.

From time to time, the production capacity at the Karlshamn plant is not included in the assessment of the power balance, as the offers from the plant in Karlshamn in the spot market are not accepted.

In these situations, it seems that SvK deliberately regulates the trade capacity on Øresundsforbindelsen, so that offers made by the Karlshamn plant will not be accepted in the spot market.

Full trading capacity on Øresundsforbindelsen, or just an increased trade capacity corresponding to the Karlshamn plant's production capacity, would not only have led to slightly higher spot prices in Sweden, but also to the offers made by the Karlshamn plant in the spot market being accepted since the prices DK2 in these situations are higher than the production costs at the Karlshamn plant. In general such actions would have resulted in more uniform electricity prices in the Nordic countries and much lower prices to the benefit of Danish market players and consumers.

### 6.2.2.2 On days where the prices offered for electricity produced at the Karlshamn plant has not been accepted because they have been above the Nord Pool spot level, electricity has been produced on the plant and exported through the interconnection to Germany – the Baltic Cable - after the price setting on the Nord Pool spot market has closed. The physical exchange on the Baltic Cable exceeds the announced capacity significantly around 30% of the time, cf. above in 6.1.8 and [Annex 3](#) and [Annex 9](#). Such errors of judgment in relation to the export capacity cannot be completely avoided but it may be noted that the error occurs often during hours of high-load operation, and therefore seems to be more a calculation than a random<sup>37</sup>:

*"In continuation of a lack of acceptance of Karlshamnsverket's offers in the spot market, Svenska Kraftnät has subsequently allowed E.ON Sverige to engage in bilateral*

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<sup>37</sup> [Annex 3](#), p. 14.

*trade on Baltic Cable so that the power station's production was sold to Germany. For hour 18 on 28 November, the capacity on Baltic Cable announced before the date of operation was 105 MW while the physical exchange was 561 MWh..."*

*"The amount by which the physical exchange exceeds the announced capacity is to a large extent equal to the production capacity at the Karlshamn plant."*

7. LEGAL ASSESSMENT

7.1 The regulatory frame work

7.1.1 In section 4.4.7 above it has been concluded that SvK shall seek to satisfy the following objectives:

- Enhancing competition and ensuring non-discrimination on the internal electricity market. Congestion problems shall be addressed with non-discriminatory market based solutions, which give efficient economy signals to the market and preferentially be solved with non-transaction based methods.
- Responsible for the bulk transmission of electric power and provide access to the grid according to non-discriminatory and transparent rules.
- Coordinating the operation of the electricity plants so they will ensure the safety of the operations and ensure the supply of power in Sweden i.a. by maintaining the balance between the generation and consumption of electricity is maintained throughout the country.
- Managing, developing and operating Sweden's national transmission grid and overseas links (interconnections) in an economically efficient and environmentally responsible way – i.e. the regulation of the transmission system has to be based on security of supply and operational reasons. SvK has the exclusive power in Sweden to regulate the transmission grid including the interconnection across Øresund and other interconnections to and from Sweden.
- The use of interconnections shall be determined on the basis of criteria, which must be objective, published and applied in a non-discriminatory manner, which ensures the proper functioning of the internal market in electricity.
- Ensuring the ability of the electricity system to meet the demands for the transmission of electricity.
- Contributing to security of supply through adequate transmission capacity and system reliability.
- Managing energy flows on the system, including exchanges with other interconnected systems, e.g. Denmark.

It does not appear from the legal framework that it is a task of SvK to pursue financial or economic goals and to discriminate between Swedish market players and consumers and players and consumers from other EU countries.

7.1.2 However, it can be concluded that SvK reduces the transmission capacity on the interconnection across Øresund in order to diminish the need for counter purchase and thereby save costs and ensuring an artificially low spot price on electricity in Sweden. Thus, it is submitted that the reduction is based on financial goals as e.g. the plant in Karlshamn has spare production capacity at the same time and thus the reduction is not based on security of supply or operational reasons. This view is confirmed by the fact that the actual physical exchanges on the Baltic Cable almost more as a rule than as a coincident exceeds the announced capacity on the interconnection, cf. [Annex 3](#) and [Annex 9](#). By reduction SvK is capable to keep the cheaper hydropower in Sweden and thus avoid costs connected to counter purchasing.

7.1.3 The case concerning the 28 and 29 November 2005 and in particular the letter of 3 January 2006 from SvK to Energinet.dk strongly proves that SvK did not allow further power transmission from Sweden to DK2 on these dates for economic reasons.

SvK announced a capacity at Øresundsforbindelsen (the day before the production day), which was so restrained that not all power plants in the Southern Sweden could be in action. The fact that the power plant in Karlshamn was not running and not asked to start running in this period supports the conclusion that SvK did not block Øresundsforbindelsen in order to ensure the power supply or balance.

7.1.4 As SvK has decided to operate with only one price area in Sweden, SvK has to use counter purchase before all capacity in Sweden would be in action. By blocking Øresundsforbindelsen SvK could diminish the need for counter purchase and still maintain one price area. The fact that the price level was below the production cost in Karlshamn proves that the decision to restrict transmission was not based on security to supply power reasons.

7.1.5 Thus, clearly SvK did not limit the transmission through Øresundsforbindelsen on 28 and 29 November 2005 for reasons of ensuring the power supply and system balance in Sweden.

7.1.6 SvK is under the regulatory frame work obliged also to seek to enhance the competition on non-discriminatory terms and to provide as much transmission capacity as possible. Hereby is not meant in our view to enhance the competition within Sweden alone. The main objective with the EU legislation in this area is to create a liberalised and open in-

ternal market for power for the benefit of the power consumers, cf. the principle in the EC Treaty Articles 28, 29 and 12. The CBT Regulation clearly confirms this view and so does the proposed amendment to guidelines as referred above in 4.2 as

*“...TSOs may not limit interconnection capacity in order to solve congestion inside their own control area, except for the above mentioned reasons and reasons of operational security.”*

7.1.7 SvK is not allowed to restrict transmission capacity through Øresundsforbindelsen for economic reasons. Thus, when SvK bases its decision to restrict transmission capacity on economic reasons, SvK violates the rules governing SvK's activities – the legal framework applicable to SvK – and hereby also the free movement of goods in the EC Treaty. As described in Section 5.9 and 6.1.2 above the illegal behaviour has caused a considerable net loss for the market players and consumers which the complainant has tried to quantify for a limited period in the analysis enclosed as Annex 9.

7.1.8 In a recently decided case C-17/03<sup>38</sup> the EJ Court was inter alia asked to give a preliminary ruling about the interpretation of Article 7 (5) and Article 16 of Directive 96/92/EC. The reference was submitted in the context of a dispute between on the one hand different undertakings engaged in electricity trade and on the other hand the Director of the Service for Implementation and Control of Energy Supply, relating to the latter's decision to reserve on a preferential basis, a portion of the capacity of the cross-border system for the importation of electricity into the Netherlands to one specific undertaking.

Article 7 (5) states that:

*“The system operator shall not discriminate between system users or classes of system users, particularly in favour of its subsidiaries”.*

Article 16 states that:

*“Member states may choose between ... negotiated access and single buyer procedure. Both sets of procedures shall operate in accordance with objective, transparent and non-discriminatory criteria”.*

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<sup>38</sup> Judgment of the Court 7 June 2005 in the case C-17/03 - “Vereniging voor Energie, Milieu en Water, Amsterdam Power Exchange Spot market BV, Eneco NV against Directeur van de Dienst uitvoering en toezicht energie”.

The EJ Court ruled that:

*“Articles 7(5) and 16 of Directive 96/92/EC are not limited to covering technical rules but must be construed as applying to all discrimination. Those articles preclude national measures that grant an undertaking preferential capacity for the cross-border transmission of electricity, whether those measures derive from the system operator, the controller of system management or the legislature, in the case where such measures have not been authorised within the framework of the procedure set out in Article 24 of Directive 96/92”.*

This is an emphasizing of that it is an infringement of the EU legislation when a TSO grants an undertaking a preferential access to cross-border transmission of electricity, and that any discrimination in the access to transmission capacity also will be an infringement.

7.1.9 Thus, it is our assessment that SvK violates the regulatory framework governing its activities by limiting transmission through Øresundsforbindelsen when the only reasons for this limitation are economical reasons to reduce the costs pertaining to counter purchases through limitation of exports and price manipulation in Sweden at the detriment of the internal market. SvK is obliged in this case where there is no risk for imbalance to let the free market set the price even if this means a greater need for and costs connected to counter purchase. This is the natural result of internal bottlenecks in Sweden.

7.2 Competition rules

7.2.1 In section 5.8 and 5.9 above it was established that it is an abuse of a dominant position if an undertaking, which has been granted an exclusivity right under law, seeks to fulfil objectives which are not legitimate under the legislation applicable to the undertaking and granting the undertaking exclusivity and if the behaviour is damaging to competition. As described SvK's behaviour is first of all a discrimination of nationalities as the regulation of Øresundsforbindelsen benefits only Swedish consumers. Furthermore, it is submitted that this behaviour reduces SvK's costs pertaining to counter purchases and keeps an artificially low price in Sweden. The behaviour is therefore based on economical purposes, which cannot be justified under the legal framework governing SvK's activities. And finally it is an abuse to discriminate between contracting parties and consumers.

7.2.2 SvK's behaviour regarding the regulation of the transmission capacity on Øresundsforbindelsen is a hindrance to competition on the relevant market for trade in electricity encompassing Sweden and Denmark.

We have concluded that it is not a valid argument for SvK for limiting transmission through Øresundsforbindelsen that SvK seeks to maintain one price area in Sweden for economical reasons only.

7.2.3 SvK has an exclusive right to regulate transmission through Øresundsforbindelsen to and from Sweden and the transmission grid in Sweden as such. SvK therefore has a dominant position based on this exclusivity granted by law. SvK is subject to Article 82, EC, cf. Article 86(2) EC since SvK is a business undertaking.

7.2.4 On this basis it is our assessment that SvK abuses its dominant position – since it seeks to fulfil a goal, which is not justified under the legal regulation for SvK's activities. The abuse consists more precisely in SvK's limitation of transmission capacity solely based on economical reasons in order to maintain a policy decided single price area in Sweden, even though such reasons are a violation of the rules governing SvK's activities as concluded above. Moreover, the behaviour is also an abuse because it is a discrimination of Swedish and Danish consumers and market players.

7.2.5 In the Commissions decisions 94/19/EC and 94/119/EC it was established that an undertaking that has been granted an exclusive right to regulate a certain facility, where no real other alternatives to the facility are present, must comply with Article 82. As the facility will constitute a separat market "the regulator" will be in a dominant position. It will therefore be an abuse if "the regulator" cannot provide objective justification for denial of access to the facility.

7.2.6 From the Dutch case referred in C-17/03 it can be derived that any preferential access to cross-border transmission of electricity or any discrimination in the access to transmission capacity will be an infringement of the EU legislation concerning common rules for the internal market in electricity.

7.2.7 SvK is not allowed to restrict transmission capacity through Øresundsforbindelsen for economic reasons but only to adminstrate the transmission system based on supply and operational reasons. Restrictions on the capacity based on economical reason will thus be a violation of the frame regulating SvK's purposes and it is at the same time an abuse of the dominant position, i.e. the exclusive right to regulate the transmission capacity across Øresund, when SvK bases its decision to regulate the capacity on an illegal reason.

Thus, the regulation of the transmission capacity on Øresundsforbindelse is an infringement of the competition rules from which SvK and the Swedish market players and consumers gain, because the purpose of the illegal behaviour is to lower the costs relating to counter purchases and the Swedish electricity spot price. This gain causes a greater loss for market players and consumers outside Sweden as shown in Annex 9.

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