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Stockholm City Court rules on "coach tour-cartel" – minority shareholders beware

When a company acquires a minority share in a competing company, legal issues concerning price-fixing, market sharing, exchange of information etc. may arise if the companies in question do not continue to regard each other as competitors. This situation has recently been tried in a judgment from the Stockholm City Court where the coach tour operators, Scandorama and Ölvemarks, were ordered to pay fines of SEK 6.8 million and SEK 4.6 million respectively.

*Background to the judgment of the Stock*holm City *Court in case T 19974-10, Konkurrensverket (Swedish Competition Authority) v. Scandorama AB and Ölvemarks Holiday AB*

In 2007 Scandorama and Ölvemarks, two competing companies, each with a significant market share on the market for coach tours to Europe ("Defendants"), agreed – under a framework and option agreement ("Agreement") – that Scandorama would acquire the whole of Ölvemarks through three successive transactions over a period of three years. The transaction was structured as follows: ten percent year one; ten percent year two; and the final 80 per cent year three. However, Scandorama found itself in financial difficulties after the transaction of the first 20 per cent of the shares of Ölvemarks, whereby the Agreement was declared null and void and the shares already acquired were returned to Ölvemarks. At the time of the first transaction, a representative of Scandorama was elected onto the board of Ölvemarks. Ölvemarks subsequently acquired Scandorama and its subsidiary Scandorama Travel AB, in 2009 instead. Since then, Scandorama and Scandorama Travel AB have been wholly owned subsidiaries of Ölvemarks.

From the first acquisition of shares until the time of the annulment of the Agreement, Scandorama and Ölvemarks cooperated on a large number of issues. Among other things they agreed, or concerted their practices, on prices, early-booking-discounts and different expense items (e.g. currency rates, fuel surcharges and tour guides' salaries). The Companies also decided jointly to cancel certain departures, which of the companies that would cancel certain tours and which new tours one or the other company should launch.

In 2010, following a dawn-raid, the Swedish Competition Authority ("NCA") brought action against the Defendants before the Stockholm City Court claiming that they had infringed the prohibition against anti-competitive agreements and requested that they

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should be ordered to pay fines. The Companies contested the application of the rules on concentrations of undertakings, since the actions in question were part of the integration within a concentration, which is why the measures could not be considered as violating the prohibition on anti-competitive agreements in the Swedish Competition Act or the Treaty on the Functioning of the European Union.

Judgment of the City Court

In its judgment in case T 19974-10, 24 February 2012, Konkurrensverket (Swedish Competition Authority) v. Scandorama AB and Ölvemarks Holiday AB, the Stockholm City Court first assessed whether Scandorama, solely or jointly, had acquired control of Ölvemarks, i.e. if the measures were to be considered as a concentration according to the Swedish Competition Act as alleged by the Defendants.

The City Court stated that an option to buy or a conversion of shares cannot in itself give rise to sole control, unless the option is exercised in the near future under a legally-binding agreement. The exercise of an option must either already have taken place or be imminent and foreseeable with a high degree of certainty in order to be considered when assessing whether control is at hand or not. Thus Scandorama had not acquired sole control of Ölvemarks.

Neither did the City Court find that joint control of Ölvemarks was at hand. In order for joint control to arise, two or more companies or persons must be able to exercise significant influence over another company. "Significant influence" is to be understood as the power to block measures that establish the business strategy of a company. The reason why the City Court did not find that joint control had arisen was that a minority share of 20 per cent did not mean that the shareholders had to agree on important decisions regarding Ölvemarks, and that the Agreement did not contain any provisions giving Scandorama veto over budget, business plans, large investments or the appointment or dismissal of the senior management of Ölvemarks. Thus it had at no time been a question of a concentration through joint control. Since the Defendants continued to be two separate entities where Scandorama had no control over Ölvemarks, the principle of the single economic entity did not apply (this means in brief that a company cannot form a cartel with itself, i.e. a wholly owned subsidiary and the parent company, as well as wholly owned subsidiaries are part of the same economic entity). Nor were the rules regarding concentrations of undertakings applicable. Therefore the City Court stated that the Defendants' actions were to be assessed under the prohibition of anti-competitive agreements in Chapter 2, Section 1 of the Swedish Competition Act.

The Defendants' actions were found to restrict competition. Furthermore the restrictions were found to be appreciable. The City Court stated that the Defendants had taken a number of actions which constituted restrictions of competition, e.g. price-fixing, discounts, coordination of fuel surcharges, coordination of procurement of coach tours in Europe and market sharing through coordination where the Defendants "released" certain destinations to each other. Thus the City Court did not have an obligation to

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assess each offence individually. Regarding the fines the City Court stated that the fact that drawing the line between anti-competitive agreements and concentrations of undertakings can give rise to difficult questions is not new and does not relieve companies of the duty to inform themselves of the application of the competition rules. Hereby, the City Court stated that there are examples in the European Court of Justice case law where fines have been imposed where cartels between companies connected through a minority share holding (cf. T-30/05, Prym och Prym Consumer v. the Commission and T-36/05, Coats Holding and Coats v. the Commission). Thus the City Court found no reason to refrain from imposing fines, or imposing only a symbolic fine. Thereafter the City Court stated that there is no support in the preparatory work to the Swedish Competition Act or in case law for the Defendants' claim that fines should be proportional to the size of the companies on the relevant market which is affected by the infringement. The City Court only stated that the Defendants were the two largest coach tour operators in Sweden. The Defendants were each other's closest competitors and had a turnover of approximately SEK 250 million per year. The fact that the infringements had taken place "in the open" since the Defendants had issued a press release announcing the forthcoming acquisitions, led the Court to conclude that there were limited opportunities for the Defendants to affect competition on the market adversely, which in turn affected the size of the fines in that it was set to a lower amount than otherwise.

The fact that the infringements were due to negligence and not intentional was also considered as a mitigating factor. All in all, the City Court found that a basic amount of 3.5 per cent of the turnover of the sales covered by the infringements should be applied (cf. the Competition Authority's claim for 7 per cent). The fines were multiplied by two for Scandorama and 1.5 for Ölvemarks to mirror the duration of the infringements.
Since a representative of both the Defendants had cooperated with the Competition Authority by giving information which contributed to the understanding of the circumstances of the case, the fines were reduced by 30 per cent for each company.
Both Scandorama and Ölvemarks claimed that their financial situation was so vulnerable that the fines should be set at a very low amount. The City Court stated that the possibility of having the fines reduced due to financial difficulties had been restricted to situations in which there is objective proof that fines would inevitably jeopardize the financial capacity of the company in question and that the assets of the company would lose its value. The City Court did not consider that the set amounts would jeopardize the Defendants' continued existence and thus there was no reason to reduce the fines.
The judgment was not appealed and has now gained legal force.

Conclusions

The important lesson a company can draw from this judgment is that when acquiring a minority share in a competing company, or when having board representation in a competing company, it is essential to make a competition law assessment of the relationship between the companies and their behaviour.

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It is very important that companies having a minority interest in a competing company continue to regard the competitor as a competitor, i.e. it must not cooperate with the company regarding e.g. prices and discounts and supply or exchange sensitive information with the company in question. For that reason, it may be inappropriate to have board representation in a competing company of which one own a minority share, since a board meeting is typically a forum for business strategy discussions and it is hard to avoid taking part of such information.

In this context, it should also be noted that concentrations of undertakings, i.e. long-lasting changes of control, which meet certain thresholds, must be notified to the competition authorities. In Sweden the obligation to notify arises when the acquiring group of companies and the target company have a combined aggregate turnover in Sweden in the preceding financial year exceeding SEK 1 billion and at least two of the companies concerned had a turnover in Sweden during the preceding financial year which exceeded SEK 200 million for each of the companies. At EU-level the obligation to notify arises when the combined aggregate worldwide turnover exceeds EUR 2.5 billion in the preceding fiscal year alternatively EUR 5 billion worldwide together with a number of additional turnover prerequisites are met for each value respectively. Even though concentrations are rarely prohibited within the EU and no concentration has been finally prohibited by a Swedish court, it is important that the parties to a concentration at an early stage in the concentration process observe and take the competition law issues into consideration.

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