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## The Swedish Market Court ends asphalt cartel case by increasing fines up to €46 M, reaching highest ever fine in a cartel case (NCC a.o.)

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### BACKGROUND

The background to the case can be traced back to dawn raids undertaken by the Swedish Competition Authority (Sw: *Konkurrensverket*)<sup>i</sup> in October 2001. The dawn raids were prompted by former employees of NCC, informing KKV about an ongoing cartel in the Swedish asphalt sector. In March 2003, KKV lodged an application for a summons with the Stockholm District Court. KKV itself cannot impose fines for violations of the Act. KKV petitioned the Court to impose fines (Sw: *konkurrensskadeavgift*) on 11 undertakings active in the asphalt sector in the total amount of 1.6 billion SEK. The application was later revised and during the main hearing, allegations were withdrawn against two undertakings and the fine petition reduced to 1.2 billion SEK.

The companies were accused of price fixing and market partitioning in the markets for the production and sales of asphalt, laying out of asphalt and construction. In particular, KKV claimed that four of the undertakings involved, NCC, Skanska, Peab and the Swedish Road Administration (acting as supplier) met annually before the asphalt season started to discuss the division of state, municipal and private contracts, and exchanged sensitive information in respect of pricing and volumes. KKV alleged further that the company which was allocated a contract distributed price lists to the other participants indicating the level over which the "losing" tenders were supposed to be given. Companies that were not actively participating in the cartel were alleged to have been compensated for not submitting tenders or for submitting tenders that were sufficiently high so that they would not succeed in getting the contract.

An interesting aspect of the case is that the Swedish Road Authority acted as both procuring authority and supplier of asphalt, taking part in the contract awards. The Market

Court decided in an intermediate judgment in September 2004 that it is possible for a public authority, which carries out multiple functions, to be part of a cartel in its role as a supplier and thus be held accountable for violations of the Act.<sup>ii</sup> The Road Authority in its capacity as supplier was thus considered as an undertaking for competition law purposes. This led the Authority to be accused of rigging bids that were submitted to another department of the same Authority.

All undertakings were found in violation of the Act in the District Court, and Chapter 2 Section 1 in particular, the Swedish equivalent to Article 81 EC. According to the judgment there was a collective intent among the companies to divide the market and set the levels of the bids that were submitted. A significant number of single agreements were sufficiently interlinked to be viewed as a single and continuous infringement. The District Court found that Article 81 EC was not applicable.

The judgment of the District Court was appealed by six of the companies and KKV. Four of the companies petitioned the Market Court to annul the judgment of the District Court, alternatively to decrease the fines. Two companies petitioned the Market Court solely to decrease the fines. KKV petitioned the Market Court, *inter alia*, to increase the fines for NCC and Peab.

### JUDGMENT

The Market Court essentially confirmed the substance of the District Court's judgment in respect of 5 participants and dismissed the allegations against one of the appellants.

The Court moreover found Article 81 EC to be applicable to the single and continuous infringement of the Act.

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In its assessment of the fines, the Court noted that it is bound by the petitions of KKV insofar as they provide for the upper limit of fines that may be imposed, in accordance with Chapter 17, Section 3 of the Swedish Code of Judicial Procedure. Moreover the Court noted that fines are not set according to EC practice, i.e. the determination of a basic amount and a subsequent adjustment of that basic amount upwards or downwards. Instead, the Court made a global assessment. For purposes of determining the level of the fines, the Court stated that the gravity and duration of the infringements take precedence. The level of the fines should moreover be set to a level which functions as a deterrent for the undertakings involved. Thereafter, possible mitigating or aggravating circumstances should be considered. The Court further stated that it should be taken into account that the infringements concerned Article 81 EC as well.

The Market Court deemed the duration of the infringements to have lasted from 1997 to 2001.

The Market Court found the investigation to support the contention that NCC had significant influence over the cartel, took the initiative for the collusion and acted as a coordinator. Moreover that NCC induced smaller companies to participate in the cartel. These circumstances were deemed aggravating factors. Due to these circumstances and the seriousness and duration of the infringement, the Court increased the fines for NCC from 150 million SEK to 200 million. It should be pointed out that NCC was granted a fine reduction of 30 per cent by KKV for facilitating the investigation.

### COMMENT

The judgment was celebrated by KKV as a victory for cartel enforcement in Sweden, and the level of the fines confirm that it is a milestone case in Swedish antitrust jurisprudence.

For NCC, the decision to appeal the decision backfired and resulted in it becoming the highest fined undertaking involved in the cartel. Prior to the Market Court ruling,

Skanska was the company that was subject to the highest fine in the amount of 170 million SEK. As a result of the Market Court ruling, however, NCC takes the highest rank with a fine of 200 million SEK. Skanska did not appeal the District Court ruling.

An interesting aspect, which is not clear from the judgment, is what impact the applicability of Article 81 EC had on the level of the fines for NCC. The Market Court merely stated that the applicability of Article 81 EC to the infringements should be taken into account.

It is highly unusual for fines to be increased on appeal at EC level. I am only aware of one case in which fines have been increased on appeal, and in that case the increase was merely 0,2 per cent for one undertaking.<sup>iii</sup> By contrast, NNC's fine was increased by 33,3 per cent.

The highest collective fine previously in a Swedish cartel case was imposed in the petrol cartel, in the amount of 112 million SEK.<sup>iv</sup> Individual circumstances aside, the fines imposed in the asphalt cartel were approximately 3,5 times bigger.

Whether this case serves as a precedent that KKV will boost its track record for winning cartel cases and succeeding in the courts imposing higher fines is too early to tell. The case, however, serves as a reminder that any appeals strategy needs to be considered carefully.

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<sup>i</sup> Hereinafter referred to as KKV.

<sup>ii</sup> DOM MD 2004:21, *The Swedish Road Administration and others v the Swedish Competition Authority* (Sw: *Vägverket m.fl. mot Konkurrensverket*), Dnr A 1/04, 2004-09-07.

<sup>iii</sup> Joined cases T-101/05 and T-111/05, *BASF AG (T-101/05) and UCB SA (T-111/05) v the Commission*, ECR 2007 Page II-04949.

<sup>iv</sup> DOM MD 2005:7, *Konkurrensverket mot Norsk Hydro Olje Aktiebolag, OK-Q8 Aktiebolag, Preem Petroleum Aktiebolag, Aktiebolaget Svenska Shell och Statoil Detaljhandel Aktiebolag och vice versa*, Dnr A 2/03, 2005-02-22.