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In case no. 6143–6144-20, **AA** and **Terrain Invest AB** (Appellants) v. the **Swedish Financial Supervisory Authority** (Respondent), the Supreme Administrative Court delivered the following judgment on 8 June 2022.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court grants the appeal in part and sets AA’s pecuniary sanction at SEK 500,000 and Terrain Invest AB’s pecuniary sanction at SEK 1,500,000.

BACKGROUND

1. The EU Market Abuse Regulation contains provisions regarding prohibition of insider dealing, unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent and detect such abuse. The Regulation aims to ensure the integrity of the financial markets and enhance investor protection and confidence in those markets.

2. For persons discharging managerial responsibilities in market-listed companies and persons or companies closely associated with them, the Regulation lays down an obligation to notify transactions which pertain to financial instruments issued by the company. Such notice must be given to a competent authority promptly and no later than three business days after the transaction was made.

3. As far as Sweden is concerned, the Swedish Financial Supervisory Authority is the competent authority and the transaction is to be notified to the Authority’s PDMR transactions register. The information in the register shall be public and available throughout the EU. The purpose of the provisions regarding the notification obligation is to prevent market abuse, in particular insider dealing, and to increase confidence in the market through full and proper transparency in

conjunction with transactions carried out by persons discharging managerial responsibilities and the persons closely associated with them.

4. The Market Abuse Regulation is supplemented by the Market Abuse Directive which prescribes that Member States shall impose criminal sanctions for certain forms of market abuse. In Sweden, the criminal sanctions have been reserved for the most reprehensible acts. Other infringements are addressed by the Swedish Financial Supervisory Authority by means of various administrative interventions. One such intervention is a decision to impose a pecuniary sanction.

5. In certain cases, the acts covered by the criminal law regime may also be addressed administratively by means of a summary imposition of a sanction. Normally, a summary imposition of a sanction involves a pecuniary sanction. In the event an issued order for summary imposition of a sanction is not accepted, the Swedish Financial Supervisory Authority may bring an action before the Stockholm District Court in order to enforce the sanction. Other intervention decisions taken by the Swedish Financial Supervisory Authority are appealed to the administrative courts.

6. The Swedish Financial Supervisory Authority may refrain from intervention, *inter alia*, where the infringement is minor or excusable or special cause otherwise exists.

7. The amount of the pecuniary sanctions is governed by provisions regarding maximum amounts; *inter alia*, a maximum amount is prescribed in euros. As regards infringement of the obligation of persons discharging managerial responsibilities and persons closely associated with them to notify their own transactions, the highest amount is EUR five hundred thousand for natural persons and EUR one million for legal persons.

8. On 9 November 2017, AA and the company wholly owned by him, Nils-Henrik Investment AB (currently Terrain Invest AB), sold shares in the online casino

company, Mr Green & Co AB, each for approximately SEK 24 million, i.e. a total of approximately SEK 48 million. AA is a member of the board of directors of Mr Green & Co AB. The transaction was published in a press release on the same day and, on the day thereafter, AA issued a so-called flagging notification.

9. A flagging notification is something which major shareholders are obliged in certain cases to issue in conjunction with changes in holdings in listed companies. The purpose of a flagging notification is to provide good transparency regarding ownership in listed companies and thereby increase public confidence in the securities market. The provisions regarding the flagging obligation are found in the EU Transparency Directive which has been incorporated into Swedish law. The notification is made to the Swedish Financial Supervisory Authority's stock exchange information database. The information shall be published and be available throughout the EEA.

10. On 21 November 2017, AA notified the entire transaction of approximately SEK 48 million to the Swedish Financial Supervisory Authority's PDMR transactions register. On 22 February 2018, he corrected the notice in such a manner that he stated that half of the shares had been sold by him and the other half by Nils-Henrik Investment AB. On the same day, the company's sale of the shares was notified.

11. The Swedish Financial Supervisory Authority took a decision to impose on AA and the company pecuniary sanctions in the amount of SEK 2,837,000 and SEK 5,400,000 respectively with reference to the fact that the transactions had not been notified to the PDMR transactions register within the prescribed time. The amounts were determined based on the Swedish Financial Supervisory Authority's guidelines for pecuniary sanctions with reference to the fact that correct notifications had been made on 22 February 2018. AA's sanction was raised by 25 per cent in relation to the standard amount set forth in the guidelines with the justification that the notification of 21 November 2017 contained deficiencies in respect of the volume of the transaction.

12. AA and the company appealed the decisions to the Administrative Court in Stockholm which rejected the appeals.

13. AA and the company appealed the judgment of the administrative court to the Administrative Court of Appeal in Stockholm which, in part, granted AA's appeal in that the pecuniary sanction was reduced to SEK 2,760,000, corresponding to in excess of three months' delay in accordance with the guidelines of the Swedish Financial Supervisory Authority. The administrative court of appeal rejected the company's appeal.

CLAIMS, ETC.

14. *AA* and *Terrain Invest AB* claim principally that the Supreme Administrative Court is to release them from the obligation to pay pecuniary sanctions and, in the alternative, that the sanctions are to be reduced. In support of their action, they state the following.

15. The market received information regarding the transactions on the same day they were carried out and the following day. This occurred by means of a press release and media reporting as well as the flagging notification. The notifications made to the PDMR transactions register provided no new information over and above that which was already available. There was no intention to conceal the transactions. In addition, no losses were incurred nor were there any concrete or potential effects for the financial system. Neither AA nor the company profited as a consequence of the late notifications.

16. The Swedish Financial Supervisory Authority's guidelines for calculation of the amount of the pecuniary sanctions is not proportionate. The guidelines take into account only the length of the infringement and the amount of the transactions, and do not take into account all relevant circumstances. In the relevant cases, amounts in millions have been imposed for something that appears to be purely

petty offences. It is important that the administrative pecuniary sanctions are not perceived to be more stringent than the criminal sanctions.

17. The guidelines have become normative and are comparable to regulations. However, the Swedish Financial Supervisory Authority has no authority to issue such regulations.

18. *The Swedish Financial Supervisory Authority* is of the opinion that the appeals are to be rejected and states the following.

19. The transactions relate to substantial amounts and have been notified too late. It is per se true that certain information regarding AA's sale has been published. However, such has not occurred in the manner prescribed, i.e. that the information is to be published by notification to the PDMR transactions register.

20. Furthermore, there is no information according to which the company was mentioned in the press release or in media reporting. The published information does not entail that the infringements are minor or excusable or that cause to refrain from intervention otherwise exists.

21. The fact that there has been no intention to conceal a transaction does not mean that the pecuniary sanction should be reduced. However, the opposite may result in an increase.

REASONS FOR THE RULING

The question in the case

22. A person discharging managerial responsibilities in a market-listed company and a company closely associated with it have failed to timely notifiy transactions to the Swedish Financial Supervisory Authority's PDMR transactions register. The question in the case is whether there is cause to refrain from imposing pecuniary

sanctions and, if such is not the case, in which manner the amount of the sanctions is to be determined.

Legislation, etc.

The EU law regime

23. According to Article 1 of Regulation (EU) No. 596/2014 on market abuse (the Market Abuse Regulation), the purpose of the Regulation is to prevent market abuse to ensure the integrity of the financial markets in the Union and to enhance investor protection and confidence in those markets.

24. Article 19(1) states that a transaction, such as the ones at issue, shall be notified to the competent authority promptly and not later than three business days after the date of the transaction.

25. Article 19(6) states that a notification shall contain, *inter alia*, the name of the person and company, the reason for the notification, the date and place of the transactions and their price and volume.

The supplemental Swedish sanctions system

26. Pursuant to Chapter 5, section 2 of the Act Containing Supplementary Provisions to the EU Market Abuse Regulation (2016:1306) (the Supplementary Act), the Swedish Financial Supervisory Authority shall intervene against anyone who has disregarded their obligations pursuant to the Market Abuse Regulation by failing to provide the Swedish Financial Supervisory Authority a notification regarding own transactions in accordance with the provisions of Articles 19(1) and 19(6) of the Regulation. An intervention may take place in accordance with section 3 by virtue of a decision regarding pecuniary sanctions.

27. Section 8, first paragraph (1) – which follows from Article 30(2), first subparagraph, point (j)(iii), of the Market Abuse Regulation – states that the pecuniary sanction for a legal person who has failed to make a notification of own transactions in accordance with Article 19(1) of the Regulation shall be determined in an amount not to exceed the equivalent of EUR one million, two per cent of the legal person's turnover during the immediately preceding financial year or, where applicable, equivalent turnover on a group level, or three times the profit of the legal person, or another person, obtained as a consequence of the rules infringement, where the amount can be established, whichever is higher.

28. Section 8, first paragraph (2) – which follows from Article 30(2), first subparagraph, point (i)(iii), of the Market Abuse Regulation – states that the pecuniary sanction for a natural person who has failed to give notification of own transactions in accordance with Article 19(1) of the Regulation shall be determined in an amount not to exceed the equivalent of EUR 500,000 or three times the profit which such person, or another person, obtained as a consequence of the rules infringement, where the amount can be established, whichever is higher.

29. According to section 17, the Swedish Financial Supervisory Authority may refrain from intervention, *inter alia*, where the infringement is minor or excusable or special cause otherwise exists.

30. It is apparent from the preparatory works that *minor infringement* should be understood to be infringements which seem to be trivial. In addition, an infringement should be excusable where, for example, it is obvious that the infringement is committed by oversight. The possibility to refrain from intervention due to the fact that there otherwise exists special cause may be used, for example, in situations in which a minor has violated the Market Abuse Regulation and it appears unreasonable to order the imposition of a pecuniary sanction thereon (Government Bill 2016/17:22, pp. 226 f. and 391 f.).

31. Section 18 states that, when the amount of the pecuniary sanction is to be established, particular consideration shall be given to such circumstances as are set forth in sections 15 and 16 and to the financial position of the relevant person and, where such may be established, the profit which such person, or another person, obtained as a consequence of the rules infringement.

32. By the reference to section 15, it follows that consideration shall be given to the degree of seriousness of the infringement and the duration thereof. Special consideration shall be given to the concrete and potential effects of the infringement on the financial system, losses which have been incurred and the degree of liability. In addition, in accordance with section 16, other aggravating and mitigating circumstances are to be taken into account.

33. The preparatory works state that the circumstances set forth in sections 15, 16 and 18 are merely examples and that a cumulative assessment is to be conducted in each individual case, whereupon the starting point shall be the seriousness and duration of the infringement. As regards duration, an infringement which has continued over a long period of time is more objectionable than one which has merely been temporary. *Losses* means, *inter alia*, losses which have affected a third person and the damage which the market may incur as a consequence of, for example, the failure to timely receive information material to the assessment of the value of the financial instrument (*ibid.*, Government Bill, pp. 223 ff. and 390).

34. According to Chapter 2, section 3 of the Supplementary Act, the Swedish Financial Supervisory Authority shall maintain or cause to be maintained a record (insider register) regarding notifications made in accordance with Articles 19(1)–19(10) of the Market Abuse Regulation. It follows from section 4 that the Swedish Financial Supervisory Authority shall publish the information notified in the insider register.

The Court's assessment

The status of the guidelines

35. The Swedish Financial Supervisory Authority has produced guidelines for determining the amount of the pecuniary sanctions. The guidelines are based on a standard model which, in turn, is based on the size of the transaction and the duration of the delay in number of trading days and months, as well as whether the infringement was committed by a natural or legal person.

36. Initially, the Supreme Administrative Court observes that an authority is free, without any special authorisation, to produce guidelines for its own operations. Such guidelines are not binding but, rather, are intended, *inter alia*, to ensure equal treatment of equal cases.

37. The Swedish Financial Supervisory Authority's guidelines have not been given a formulation or content which characterises them in any manner other than precisely as guidelines. AA and the company's assertions regarding the guidelines being comparable to regulations and that they have not accordingly been promulgated in the prescribed order thus do not constitute cause to alter the decisions appealed.

Generally regarding the amount of the pecuniary sanctions and the guidelines of the Swedish Financial Supervisory Authority

38. In addition to the maximum amounts in the Supplementary Act, there are no detailed provisions regarding the manner in which the amount of the pecuniary sanctions is to be established. However, recital 71 of the Market Abuse Regulation states that the starting point is that the pecuniary sanctions are to have a deterrent effect. Accordingly, they are presumed to be relatively high. At the same time, it is presupposed that a pecuniary sanction will be reasonable in

relation to the gravity of the infringement in comparison with other types of infringements (see Government Bill 2016/17:22, p. 225).

39. It may also be deemed to follow from recital 71 of the Market Abuse Regulation that the pecuniary sanctions should normally be determined for legal persons in a higher amount than for natural persons for the same type of infringement. In a comparable way as applies within many other areas, furthermore, the pecuniary sanctions for legal persons, in the view of the Supreme Administrative Court, should be able to be related to the relevant legal person and, thus, be able to be determined in various amounts depending on, for example, the size or financial position of a company.

40. Based on these starting points, the amount of a pecuniary sanction is to be determined taking into account the gravity of the infringement and its duration. Particular consideration shall then be given to the concrete and potential effects of the infringement on the financial system, losses which have been incurred and the degree of liability (Chapter 5, sections 15 and 18 of the Supplementary Act and Article 31(1), points (a) and (b), of the Regulation).

41. The determination in the administrative system is not contemplated to entail any more far-reaching assessments of subjective circumstances. At the same time, in conjunction with the determination of the degree of liability, it should be possible to a certain degree to factor in whether there are any circumstances which cause the infringement to be regarded as more or less reprehensible than it would otherwise be, e.g., if it may be assumed that there was an illegitimate purpose behind the failure to provide, or the delay in, the notification.

42. Typically, the longer the amount of time the infringement persists, the more serious it is. At the same time, in certain situations, it may be so that the infringement, following a certain period of time, loses its significance or even becomes irrelevant. For preventative reasons, a pecuniary sanction should nonetheless be imposed, but there may be cause to not regard the entire period of

time during which the infringement has persisted in the determination of its amount.

43. As regards the gravity of the infringement in other respects, including its potential and concrete effects on the financial system and any losses incurred by the market or third parties, the determination must be made on the basis of the circumstances in each individual case. The amount of the transaction is then something to be factored in.

44. As regards the Swedish Financial Supervisory Authority's guidelines, the Supreme Administrative Court notes that the standard amounts are determined on the basis of the size of the transaction and the amount of time the infringement has persisted. This construction entails that the progression in the amount of the sanctions becomes considerable in situations in which the matter involves high amounts and longer periods of time.

45. Even if the guidelines allow disregard of the standard amounts, the construction is not unobjectionable since, in practice, it entails that other factors to be considered in determination of the sanction have limited effect and a cumulative assessment is thereby not carried out. The amount of the pecuniary sanctions will then not reflect the extent to which the effects on the financial system have come about or may be expected, whether losses were incurred or the degree of liability. In addition, this construction fails to take into account the fact that the effects of the infringement may diminish over time.

46. Standard amounts determined this way may also cause a pecuniary sanction to fail to appear well balanced in relation to the gravity of the infringement relative to other types of infringements of the relevant regime.

47. As regards infringements which are criminalised, the preparatory works state that it must per se be deemed to be significantly more intrusive to be found guilty of a crime than to be subjected to an administrative sanction. An administrative

sanction for an infringement which is less serious than a criminal offence should accordingly be able to rise to a substantially greater amount than the cumulative day fine resulting from a sanction in the form of a conditional sentence combined with a day fine. At the same time, it is stated that the system would lose credibility if the administrative sanctions amount to very high sums while the criminal penalties imposed are normally conditional sentences combined with fines. In addition, it is stated that it will be incumbent upon the courts to find a suitable balance between the various types of sanctions and penalties (Government Bill 2016/17:22, p. 226).

48. In case NJA 2020, p. 858 I–III, paragraphs 20–22, the Supreme Court determined that the pecuniary sanction for infringements in the form of a limited order for an individual share which influences the price without corresponding to an actual change in the asset and demand for the share, a so-called "*enpetare*", shall, as a starting point, be established at between SEK 40,000 and 140,000. In the absence of mitigating or aggravating circumstances, SEK 70,000 constitutes a sort of normal amount. The Supreme Court was of the opinion that the levels of the amounts reasonably reflect the gravity of the infringements of this type and, furthermore, correspond to the requirements of EU law.

Is there cause to refrain from intervention in the current cases?

49. AA and the company claim, *inter alia*, that, since the market received the information regarding the transactions at the right time, via the flagging notification and the press release, the purpose of the Market Abuse Regulation was fulfilled, and the Swedish Financial Supervisory Authority thus had no cause to intervene.

50. Pursuant to Chapter 5, section 17 of the Supplementary Act, the Swedish Financial Supervisory Authority may refrain from intervening, *inter alia*, where the infringement is minor or excusable or special cause otherwise exists. The Supreme Administrative Court has stated that, in the light of the purpose of the

Regulation and when a notification in accordance with Article 19(1) is to be made promptly and no later than three business days after the transaction, there is reason for a restrictive application of the exemption provisions (HFD 2019 reported case no. 72, paragraph 24).

51. In the view of the Supreme Administrative Court, the size of the transactions and the duration of the delay alone entail that the infringements cannot be regarded as minor. Nor may it be deemed obvious that the infringements were committed by oversight in such a manner that they are excusable within the meaning referred to in Chapter 5, section 17.

52. In addition, the purpose of a notification to the PDMR transactions register is not the same as the purpose of a flagging notification (see paragraphs 3 and 9). The provisions regarding flagging are also found in other rules and regulations – *inter alia*, in the Financial Instruments Trading Act (1991:980) – and such a notification must contain the information and be formulated in the manner prescribed therein and, furthermore, published in another register. The fact that AA has submitted a flagging notification within the prescribed time accordingly does not mean that the obligation to make a notification to the PDMR transactions register has been obviated. The same applies to the press release and the media reporting.

53. The flagging notification and other published information regarding the transactions thus does not entail that the infringements were excusable or that there are other reasons for refraining from intervention. It was accordingly correct to intervene against AA and the company.

The amount of the pecuniary sanctions in the current cases

54. As it was ultimately determined by the administrative court of appeal, the pecuniary sanction for AA was set at SEK 2,760,000, which corresponds to the standard amount in accordance with the guidelines for a natural person for a

transaction of SEK 20 million or more which is notified more than three months too late. The pecuniary sanction for the company was set at SEK 5,400,000, which corresponds to the standard amount according to the guidelines for a legal person for a transaction of SEK 20 million or more and which is notified more than three months too late.

55. Even where in individual cases a balancing is always to be carried out of all of the factors in the determination of a pecuniary sanction, in many cases, for reasons of equal treatment, it may be justifiable to proceed on the basis of the standard amounts according to the guidelines of the Swedish Financial Supervisory Authority. However, these must be disregarded where the outcome in the individual case does not appear proportionate (*cf*. HFD 2019 reported case no. 72).

56. As regards the relevant infringements, the Supreme Administrative Court makes the following assessment.

57. The infringements must per se be deemed to be serious. By virtue of the fact that notification was not given in the proper manner, the shareholders and market participants have not had access to complete and correct information in the register in which the information is to be present. The size of the transactions and the fact that the delays were significant increase the gravity.

58. Each infringement of the notification obligation may, furthermore, be deemed to have potential effects on the financial system, e.g. a risk of reducing confidence on the part of market participants (HFD 2019 reported case no. 72, paragraph 32). However, as far as is known in this case, no concrete effects on the financial system came about nor has there been an allegation that any losses were incurred by a third party or the market.

59. AA and the company bear sole responsibility for the fact that the notifications were not given in the correct manner. The infringements, however, appear to have

been caused by lack of knowledge and with no intention of withholding information from the market. Neither AA, the company, nor any other party appear to have profited as a consequence of the delay in the notifications.

60. With regard primarily to the size of the amounts and the potential effects on the financial market, the infringements may be deemed to be more serious than the infringements examined by the Supreme Court in case NJA 2020, p. 858 I–III (see paragraph 47) and should therefore entail significantly higher pecuniary sanctions. The pecuniary sanctions decided, however, are so much higher that they do not appear to be comparably well-balanced. Furthermore, they amount to more than half of the amounts in euro, five hundred thousand and one million respectively, which the Supplementary Act prescribes as the maximum amount for infringements of the relevant type. According to the Supreme Administrative Court, the pecuniary sanctions appear to be disproportionately high.

61. In an overall assessment of all of the circumstances, the Supreme Administrative Court is of the opinion that the sanction for AA shall be set at SEK 500,000. As regards the company, it should be kept in mind that the pecuniary sanction for legal persons should normally be determined at a higher amount than for natural persons for the same type of infringement. Accordingly, the sanction is set at SEK 1,500,000.

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Justices Henrik Jermsten, Inga-Lill Askersjö, Kristina Svahn Starrsjö, Ulrik von Essen and Johan Danelius have participated in the ruling.

Judge Referees: Cecilia Torstensson and Emelie Dahlgren.