[SE] Court of First Instance Holds Collecting Society Responsible for Anti-Competitive Behaviour

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ALIS, a Swedish collecting society, filed two lawsuits against the *Mediearkivet* (Media Archive) alleging that it was in breach of the Act on Copyright in Literary and Artistic Works when using articles not paid for. The Media Archive administrates an internet-based information database, where it sells subscriptions which enable the user to search among and use the articles available. The Media Archive responded by claiming that ALIS's agreements with the rightsholders were a restraint of trade, according to Section 7 of the Swedish Competition Act, as well as of Article 81§3 of the EC Treaty. On the 26 of August 2008, the Stockholm District Court announced its judgment, holding ALIS responsible for anti-competitive behaviour.

The court initially stated that Article 81§3 of the EC treaty is applicable in parallel with the Competition Act, because the co-trading effect criterion is met. The Court considered that collecting societies do not per se breach the probation against anti-competitive agreements. The Court however stated that collecting societies are not immune, in the sense that there is a risk that they enter into agreements that are considered to be a restraint of trade, according to Article 81§1 of the EC Treaty and Section 6 of the Competition Act. Nor are they protected by some kind of legal exception.

The court found that the burden of proof for a restraint of trade rested on the Media Archive. After a detailed review of the EC legislation, the Court nevertheless declared that it was unreasonable for the Media Archive to have to present an extensive market analysis for their claim to be successful. The court chose to apply a step-by-step analysis, where the demand of proof was adjusted to the disputed question of restraint of trade.

The existence of a larger negotiating party on the vendor's side could generally reduce the transaction costs. However, since ALIS does not in an explicit way declare whom they represent and this is only made available upon request, the efficiency gained from the agreements becomes negligible. ALIS's activities are built on a business model whereby negotiations are held with every single commercial buyer, concerning each piece of work. They do not offer licences where the conditions are transparent and clear. Nor do they provide their customers with a package deal in the shape of an extended collective licence.

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Furthermore, as ALIS enjoys exclusive rights to the rights administered, the organisation holds a monopoly on these rights. There was also evidence pointing towards monopoly pricing.

In conclusion, the Court rejected ALIS's claim for compensation in the two cases. It cited that the organization lacked standing, as the rights-holders' association agreements with ALIS were invalid because of illegality, according to Section 6 of the Competition Act and Article 81§1 of the EC treaty. The Court referred to another case pending before it, where a more detailed decision is expected on what parts of ALIS's business are in breach of Competition law.

The Stockholm District Court's decision was appealed on 16 September 2008 by ALIS to the Svea Court of Appeals.

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Stockholm District Court decision, 26 August 2008, in cases no. FT 27829-06 and FT 2875-06

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