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**INVESTIGATIVE POWER IN PRACTICE - Breakout session 2: Requests for
information - Limits and effectiveness - Contribution from Sweden**

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Investigative Powers in Practice

Breakout session 2 - Requests for information: Limits and Effectiveness

- Contribution from Sweden –

1. Introduction

1. This submission begins with introductory comments on the Swedish Competition Authority's (SCA) view of the investigative tool of requests for information (RFIs) and continues in Section 2 with a brief review of the legal framework for RFIs in Sweden. The main part of this submission, sections 3 and 4, consists of a presentation of, and reflections based on, the SCA's experiences when working with RFIs, although it does not review individual cases. Finally, Section 5 contains a conclusion.

2. RFIs generally play a central role in the investigations by the SCA, as they are one of the authority's main tools for acquiring information. They are often used alongside other investigative measures such as inspections and interviews, but are in many cases more versatile and cost effective, as will be elaborated on below.

3. The SCA's means of requesting information can primarily be categorised into two types. The SCA may issue requests for information that do not legally require the receiving party to answer. This type of request is mainly used when sending out questionnaires to a larger number of respondents. The second type is a formal order (*åläggande*) which is mandatory for the addressee to answer. These mandatory requests are issued directly on the basis of the Swedish Competition Act¹ and are mainly used to acquire information from undertakings subject to the SCA's investigations or from other undertakings of central interest to the investigations. In the context of this submission, the term RFI will be used to refer to the second type.²

4. Through recent court judgments, the SCA has identified a trend of the Swedish courts requiring more in-depth economic analysis by the SCA in cases concerning infringements of the competition rules. This, combined with the increased complexity of investigations, has had the consequence that the SCA has seen a need to acquire more information in its investigations, concerning both the infringements themselves and the markets concerned.

¹ Konkurrenslagen (2008:579).

² In addition to this, the SCA also has the possibility of requesting information in issues not directly related to its enforcement duties under the Swedish Competition Act. This possibility is mainly used when the SCA conducts market studies and related enquiries, and will not be discussed further in this submission.

2. The legal framework for RFIs in Sweden

5. According to the Swedish Competition Act³, the SCA may require undertakings or other parties to supply information which the SCA needs to perform its duties under the Act. This is done by an order. Such an order may be directed at the undertakings that are being investigated or any other entity. The decision by the SCA to issue an RFI may be appealed in court.

6. An RFI must be precise and must not impose a burden on the addressee that is disproportionate to the importance of the measure. The information requested must be necessary for the SCA to investigate a suspected infringement of the Swedish Competition Act (or the Treaty on the Functioning of the European Union) or to perform merger control.

7. As mentioned above, it is always compulsory for the addressee of an RFI to answer. There is, however, no general obligation for the party concerned to cooperate or collaborate with the SCA beyond following the direct specifications of the RFI.

8. An order to supply information may be imposed under the penalty of a fine.⁴ The SCA must specify in the RFI if the addressee risks a penalty of a fine in the case of non-compliance. If the SCA finds that the addressee has not complied with the RFI, a separate procedure before court is needed to enforce the fine.

9. No such enforcement procedure has been initiated by the SCA to this date. The central question in such a process would be to determine whether the addressee had taken reasonable measures to follow the order. The intentional submission of false or misleading information would be grounds for enforcement, but under certain circumstances neglect would also be sufficient.

10. An RFI may not require an undertaking to supply information covered by attorney-client privilege. There is also no obligation to disclose business secrets of a technical nature.

11. RFIs issued by the SCA have on some occasions been challenged in court on the grounds that they were not sufficiently clear and put a disproportionate burden on the addressee. So far the courts have not overturned any of the SCA's RFIs.

12. On an international level, the SCA may issue RFIs at the request of a competition authority of another Member State of the European Union or an authority in a state with which Sweden has entered an agreement of legal assistance in competition cases.⁵ In the same way, the SCA may request legal assistance from other national competition authorities to send, on behalf of the SCA, RFIs to undertakings located on their territories, using their domestic legal powers.⁶

13. An EU directive is currently being finalised which, once implemented, will guarantee certain minimum enforcement powers for the national competition authorities of the EU. One such power is to impose or request the imposition of fines on undertakings

³ Chapter 5, Arts. 1 and 3 of the Swedish Competition Act.

⁴ Chapter 6, Art. 1 of the Swedish Competition Act.

⁵ Chapter 5, Art. 14 and 19 of the Swedish Competition Act.

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 22.

that intentionally or negligently supply incorrect, incomplete or misleading information in response to an RFI or do not supply information within the specified time limit.⁷

3. RFIs in practice – some challenges

14. Although RFIs are the most common investigative tool, case-specific factors and circumstances should be considered when contemplating sending an RFI in order to get the best possible outcome from this investigative measure. The following sections outline the main factors and circumstances that, in the SCA's experience, may need to be reflected upon.

3.1. The initial information at hand

15. The SCA often initiates its investigations as a result of a complaint or an application for immunity. At an initial stage the SCA decides if there are grounds for carrying out an inspection or if it would be more suitable to gather information through RFIs. If deemed appropriate, an initial complaint may be followed by interviews with the investigated undertakings or third parties before we issue an RFI. This can enable the case team to get a better understanding of the market and formulate more precise questions. Depending on the origin of the case, it may be relevant to consider using information already in the authority's possession – for instance as a result of a previous investigation – in order to make RFIs as precise and effective as possible.

16. Generally, the SCA is free to use information collected in one investigation in another separate investigation. The SCA must however, formally add the information to the new case file in such a way that it is completely clear for the investigated parties what constitutes the underlying information and the initial evidence of the investigation. The SCA has used information received in other cases, such as merger control cases and market studies, to prepare RFIs in later investigations. In most cases case teams rely on the information obtained in the current investigation and, if such exists, an initial complaint.

3.2. The stage of the investigation

17. When starting an investigation, the different investigative tools at the authority's disposal must be carefully considered and balanced against each other to evaluate their appropriateness and effectiveness under the particular circumstances of the case. The cost, time and human resources engaged in carrying out the measure must be considered, as well as the expected result. As further explained below, the expected result is a decisive factor.

18. Early in the investigation it is often most effective to issue a relatively general or more standardised order that is adapted to the investigation in question. Such an order may encompass all relevant documents concerning the suspected practice, formulated so as not to miss any information relevant for the investigation. If it can be expected that such a request would cover a large number of documents in the addressee's possession, one option could be to begin by requesting an exhaustive list of potentially relevant documents. When requesting such a list it is advisable not to leave the request open for interpretation, so as not to leave room for discretion for the addressee to decide on what is of interest to the

⁷ Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

investigation. Based on that list, the SCA can then follow up with a request for specified documents, without unnecessarily burdening the addressee or swelling the case file.

19. At a later stage of the investigation it may be more fruitful to pose more precise and detailed questions on certain topics. Again, a decision needs to be made as to whether to use RFIs or another investigative tool, such as interviews. This may depend on what information the authority is hoping to extract.

20. According to Swedish procedural law, the scope for using written testimonies or explanations in court is very narrow. The SCA therefore mainly relies on interviews at the investigation stage, which can later be replicated as witness statements in court. Interviews are a useful means of receiving explanations on facts and putting them into context.

21. RFIs may be preferable for the purposes of securing evidence that can be used in court if there is reason to believe that the undertakings concerned possess documents and data which they have already used in their operations. The case team can also request the addressee to give written explanations to aid the SCA in the investigation. These must however generally be replaced by oral testimonies in a procedure before the courts.

22. In some cases, although inspections could also have been an appropriate measure, the SCA has found it more effective and appropriate to start the investigation with RFIs. This could be the case, for instance, where the SCA has strong indications of the existence of anti-competitive practices among a large number of undertakings and, due to capacity restrictions, the case is not suitable for inspections. It may also be the case that the SCA considers it likely that RFIs will yield a satisfactory result, in which case inspections may be deemed an unnecessarily intrusive measure.

23. Finally, it should be noted that the use of RFIs at the beginning of an investigation does not preclude the use of inspections at a later stage. This may be appropriate where different addressees of an RFI give conflicting replies, indicating that one or both are withholding evidence. RFI responses may also reinforce or give rise to new suspicions which necessitate an inspection. This order of proceeding has so far been rather uncommon in Sweden, however.

3.3. The expected results

24. In the Swedish Competition Act, RFIs are seen as a less intrusive measure than inspections. The SCA must therefore always consider if an RFI is sufficient in order to acquire the relevant information before using the tool of inspections.

25. RFIs are, however, only seen as a viable alternative to inspections when the SCA expects that the addressee will answer the questions truthfully and refrain from withholding or destroying evidence. Balancing this risk and the expected results will therefore be decisive when contemplating sending an RFI. Provided that the addressee is not inclined to withhold or destroy evidence, the conclusion cannot necessarily be drawn that the SCA would find more evidence in an inspection than through an RFI.

26. One way of improving the authority's chances of getting full and truthful answers from addressees is to issue RFIs to several suspected undertakings at once. This increases the risk that each undertaking runs if it were to withhold evidence which was also in the possession of another addressee.

3.4. The type of information requested

27. Provided that the information requested is necessary and proportionate to the investigation as outlined above, there are no legal limits in respect of the type of information that can be requested through an RFI, other than in respect of legal privilege rules and business secrets of a technical nature. However, the SCA's experience has shown that some kinds of information and evidence are more appropriate to request through RFIs than via other investigative measures.

28. The SCA has very successful experiences of gathering evidence such as email correspondence (internal and external) and other documents in possession of the addressee. Documents that can be required range from company-internal minutes from meetings, draft notes, Powerpoint presentations, market and customer analyses, to commissioned reports such as commercial analyses and consumer research or minutes from external meetings.

29. In addition to such documents, descriptions and explanations of facts may likewise be appropriate to request in RFIs. In short, objective and factual information is very suited to collection via an RFI. Statistical data, turnover and market share figures are examples of information that the SCA tends to use RFIs to collect.

30. On the other hand, other types of information, such as descriptions of a chain of events, may be more appropriate to investigate through interviews since follow-up questions can be posed directly and immediately.

31. The SCA has also found that it is important to ask direct questions on facts that the addressee can answer, and refrain from using terms specific to competition law. For example, instead of asking an undertaking to define its relevant market the RFI will ask for the facts which will help the SCA to make its own analysis. It is also important to be precise, as any vagueness may have the effect that the question will not be properly answered, or that the value of the reply can be questioned by the defendant in subsequent court proceedings.

32. More subjective judgements or information (e.g. the rationale behind an agreement or unilateral behaviour) might in some cases be appropriate to ask in RFIs. Such questions are, however, generally more suitable to ask during an interview since follow-up questions can be asked to immediately clear up uncertainties. Furthermore, written explanations, if accepted at all, are not considered to have as strong evidentiary value as oral evidence in Swedish court procedures.

3.5. How to formulate the questions

33. A factor for success in obtaining the type of information and documents mentioned above is to give close attention to the formulation of the questions.

34. To define, limit and formulate questions as precisely as possible is a key issue when drafting an RFI. The quality of the expected answers will depend on the precise formulation of the questions. For instance, when asking for email correspondence, it is crucial to specify the time limits for the correspondence required, the persons concerned (within the companies or to/from another company), and the subjects concerned (e.g. the agreements or products concerned).

35. The formulation of an RFI will not only have an impact on the quality of the answers but also on the amount of information collected. As large amounts of information risk slowing down an investigation, it is very important to detail the exact information

needed in order only to collect targeted information. At the same time, the formulation needs to provide scope not to exclude information relevant to the investigation. The SCA has found in some cases that the main problem was that the case team was swamped by documents, rather than the addressees trying to withhold information.

36. An objection that is raised from time to time by addressees of RFIs is that the questions are too broad or that too many documents would fall under the questions. One way of dealing with such complaints is to have a dialogue with representatives of the company. For instance, in respect of documents such as reports, drafts or minutes from meetings, it may be judicious to ask the company to list and briefly describe the documents that are covered by the RFI, instead of providing them all. As a second step, the question can be reformulated and narrowed down to the necessary documents. In respect of email correspondence, it is not unusual that the questions catch a very large number of documents, or at the very least that the addressee must search through a very large number of documents to identify those relevant to the RFI. Here again, it may be useful to have a dialogue and for instance agree on search words and techniques that can be used to comply with the RFI.

37. Some addressees may further object that technical or IT aspects impede them from providing the documents requested in the RFI. As above, it may be useful to have a dialogue with the company and clear up the reasons for not being able to provide the requested documents. In respect of IT challenges, the authority may wish to clarify whether the company has the requested material in its possession or not, or has access to it in another way, whether it has been deleted and if so whether it can be retrieved. Such a dialogue would aim at obtaining the information under reasonable conditions, insofar as the company disposes of the information.⁸ These dialogues also aim at finding a solution to how the SCA can get the relevant information and find a way around technical difficulties that undertakings may have to locate and extract the information required.

38. The dialogues described above may in particular give fruitful results when conducted proactively before sending an RFI. In that way, the questions can be better adapted and made more precise, increasing the likelihood of a positive outcome of the RFI. Whether such a dialogue can be conducted beforehand often depends on the stage and the characteristics of the investigation. When technical aspects are at stake, such dialogue may naturally include the participation of IT experts of both the companies concerned and the SCA. Forensic IT expertise may be very useful in order to evaluate, and if necessary challenge, the argumentation put forward by the companies concerned.

39. Some companies have argued that responding to an RFI and gathering the requested documents would be very time consuming and financially costly for them. Companies may have different capabilities to comply with an RFI depending on their size and organisation. In such cases, the general principle of proportionality gives guidance as to the level of the information that is deemed to be appropriate to request from a company.

⁸ The SCA cannot send an RFI by order to a company that does not dispose of the requested information or does not have it in its possession, i.e. information that would need to be obtained from a third party. In such case, the SCA must directly target the third party concerned.

3.6. Proportionate and necessary to the investigation

40. Indeed, careful attention should be given to the proportionality principle when drafting an RFI. As explained above, the proportionality principle ensures that the value of the requested information to the SCA's investigation is balanced against the burden and intrusion it causes the addressee. The information must also be necessary to the investigation, i.e. relevant to the assessment of the suspected infringement. The Swedish Patent and Market Court (PMC) (*Patent- och marknadsdomstolen*) has elaborated on these principles in a recent decision.⁹ The decision follows a company's challenge of an RFI from the SCA, compliance with which necessitated the company to search through a large amount of email correspondence in order to locate emails covered by the request. The PMC acknowledged that providing these documents required extensive searches and manual work, but nevertheless found that the RFI was sufficiently precise, proportionate and necessary to the investigation. When assessing proportionality, the court also noted that the formulation of the RFI gave the company some flexibility as to the method for gathering the requested information.

3.7. A systematic approach

41. Finally, knowledge management of these issues is very important to the success of this investigative measure. The SCA has established methods, including a "menu" of template questions, that can be used by the case handlers as a starting point.

4. How to handle the results

4.1. How to handle large amounts of complex information

42. The SCA's investigations, as well as the competition issues and conduct under investigation, have increased in complexity over the past few years. This, in turn, increasingly leads the SCA to request large amounts of complex information.

43. To process and further analyse the information, it is fundamental to structure the collected material in a way that makes it manageable. Although there are some forensic tools available for managing large amounts of information, a lot of manual work is still required. The authority must be prepared to appoint dedicated resources to process such material in a timely and effective manner.

44. It can enhance efficiency to ask the undertakings to provide the documents in electronic form if possible. This can speed up the process of collecting the information, but mainly it brings the advantage that the documents are searchable with IT-forensic tools.

45. Even though there is no general requirement on companies subject to an RFI to cooperate, it can be useful to establish a dialogue with them and discuss a suitable manner in which to present the requested information. For instance, the SCA often attaches to its RFIs an excel file with tables to fill in, helping the company to structure the figures requested.

⁹ Patent- och Marknadsdomstolens decision of 15 June 2018, case no. PMÅ 7090-18.

4.2. How to detect false or misleading information

46. On some occasions, the SCA has had reason to check the information it has received from a respondent by comparing and cross-checking it with information submitted by another undertaking in the investigation. On one such occasion, the SCA concluded that there was reason to suspect that a respondent had withheld correspondence with another respondent, mainly because the latter had submitted email correspondence between the parties that the former said did not exist. This missing information led the SCA to pursue the investigation using an inspection in order to ensure that no other information had been withheld. The fact that the respondent had not supplied the required information was one of the reasons the SCA made this decision.

47. The SCA has found that it can be useful to take advantage of the asymmetry of information between the SCA and the undertakings addressed in RFIs concerning what material is already available to the authority. In cases where the SCA sends out RFIs to multiple undertakings, the addressees are generally not informed about who else has been contacted, in order to make it harder to calculate what information could safely be withheld from the SCA. At the same time, this gives the case team the possibility to cross-check the received information to some extent.

48. The authority's impression is that undertakings are more inclined to answer orders (with or without fines) than formless questionnaires. When an addressee has not complied with an initial RFI without sanctions, the SCA has renewed its request with the threat of a fine for non-compliance, which has had the result of the undertaking taking further measures to comply with the RFI.

5. Conclusions

49. The SCA often uses RFIs as a tool in its investigations. RFIs have generally proved to be a successful tool, provided that precise and proportionate questions have been formulated. The use of RFIs is a valuable alternative to inspections in cases where there is little risk that evidence will be destroyed or withheld.

50. The SCA has found that it is important to do thorough preparatory work regarding the wording of the RFI. When deemed appropriate, the SCA has had a discussion with the addressees before sending out an RFI. Such discussions have helped the SCA to formulate an RFI that can be answered by the undertaking in a more expedient and effective way.

51. RFI's often prove most successful when they relate to descriptions and explanations of facts or requirements to provide existing documents (such as emails). Subjective judgements or descriptions of a chain of events may be more appropriate to investigate through other tools such as interviews.

52. It is important to structure large amounts of information received in such a way that it is easy to work with the information throughout the investigation. A dialogue with the addressee can also assist in ensuring that information is provided in a suitable manner.

53. In order to verify the accuracy of the information it can be appropriate to send RFIs to multiple companies simultaneously, which makes it possible to cross-reference the information.