

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON HOW TO DEFINE CONFIDENTIAL INFORMATION

-- Sweden --

29 October 2013

This note is submitted by Sweden to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item IV at its forthcoming meeting to be held on 29 October 2013.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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– Sweden –

1. Introduction

1. The principle of public access to information is one of the main principles of constitutional law in Sweden. It dates back to 1766. The principle applies to almost all public authorities in Sweden, including limited companies entrusted with official powers of control in relation to private parties.

2. The principle of public access to information is expressed in various ways.

1. Access to official documents - This means that everyone is entitled to read the documents of public authorities, i.e. official documents that are not secret.
2. Freedom of expression for officials and others. This means that officials and others who work for the state or municipalities are entitled to say what they know to outsiders. This principle can however be restricted by law, for instance in relation to the duty of confidentiality.
3. Right to communicate and publish information. This means that officials and others in the service of the state or municipalities are normally entitled to disclose information to newspapers, radio and television for publication or to personally publish information.
4. Right of access to the court hearings and meetings of decision-making assemblies.

3. The purpose of the principle of public access to information is to allow for transparency and insight by the public into the activities of authorities in order to encourage public debate and to control how the state's finances - taxpayers' money - are spent. The archives of authorities are open to students and researchers who want to study a certain social phenomenon. Authorities are required to ensure that everybody is entitled to exercise his or her democratic rights. Authorities must not search for or punish an employee who has spoken about the activities of the authority to external parties, unless the information is protected by secrecy.

2. Public access to official documents¹

4. The Freedom of the Press Act (one of the constitutional acts of Sweden) regulates the right to obtain official documents. This means that everyone - the general public and the media - is guaranteed insight into the activities of central government and municipal authorities. All "official" documents in competition files (antitrust and mergers) fall within the scope of this legislation. Consequently, the public at large (Swedish and foreign citizens alike) - are entitled to read the authorities' public documents to the extent the documents are not classified as secret according to the Swedish Public Access to Information and Secrecy Act (2009:400).

3. Definition of confidential information

5. The primary rule under Swedish public law is that official documents are public. A document is deemed as official if it is held by a public authority and according to special rules is regarded as having been received or drawn up by a public authority. Official documents may not be kept secret under any circumstances other than to protect interests specified by legislation. The situations in which official

¹ For further information about the handling of requests for information by the Swedish Competition Authority ("SCA"), and the circumstances under which confidential information may be transmitted to other competition authorities please also refer to the SCA's responses under section 5 of the OECD/ICN Survey on International Enforcement Cooperation.

documents are secret must be carefully specified in a special statute, namely the Public Access to Information and Secrecy Act.

3.1 The definition of confidential information refers to information of some definite kind

6. The information to be protected by the Public Access to Information and Secrecy Act must be of some definite kind (for example “Sweden’s relations with another State” or “the personal circumstances of a private party”).

7. The majority of secrecy provisions are subject to prerequisites regarding their applicability, which require that certain special conditions are met. The condition is usually formulated as a “*requirement of harm*”. Such a requirement means that secrecy applies provided it can be assumed that some stated risk of harm would arise if the information was disclosed.

8. In terms of secrecy to protect individuals/private parties in relation to the activities of the Swedish Competition Authority (the “SCA”), the word “harm” refers to economic harm that someone may suffer as a result of information about their financial circumstances being disclosed to, for example, a business competitor. The standard applied here is referred to as a “straight requirement of harm”, meaning that the default rule is that secrecy *does not apply* and that the information may be disclosed, unless the requisite is proved.

9. At the Swedish Competition Authority the following can specifically be protected by secrecy according to the Public Access to Information and Secrecy Act.

3.1.1 Secrecy in the public interest

- The SCA’s activities regarding the planning of an inspection or other forms of audit, if the purpose of the inspection would otherwise be revealed. (Chapter 17 § 1)
- In the activities of the SCA regarding certain investigations “secrecy applies to information which refers to an investigation regarding cooperation agreements or abuse of dominant position, if, having regard to the investigation, it is of particular importance that the information is not to be disclosed.” (Chapter 17 § 3)
- Legal assistance in international competition matters (requests for information and investigations at the premises of undertakings) if it can be assumed that the legal assistance has been requested under the condition that the information is not revealed. (Chapter 17 § 5)

3.1.2 Secrecy in the interest of a private person

- Business secrets etc.

“Secrecy shall apply in the activities of the SCA regarding supervision and investigation”

1. to information concerning a private party’s business or operational circumstances, inventions and research results, if it can be assumed that disclosure of the information would cause harm to the private party; and
2. to information about other economic or personal circumstances than those prescribed in 1 concerning a party in a business or equivalent relationship with the subject of the Authority's activities.” (Chapter 30 § 1)

- Notifications and information or statements from private parties.

“Secrecy shall apply at the SCA regarding the investigation of national competition matters (agreements or unilateral conduct) or infringements of article 101 or 102 TFEU to information in a notification or statement from a private party, if it can be assumed that disclosure of the information would cause substantial harm or significant injury to the private party.” (Chapter 30 § 3)

3.1.3 Sweden’s international relations etc.

“Secrecy shall apply to information which refers to Sweden’s relations with another state or information that concerns another state, international organization, authority, citizen or legal person in another state or a stateless person, if it can be assumed that disclosure of the information would hinder Sweden’s international relations or cause harm to the country.” (Chapter 15 § 1)

- Electronic information

“Secrecy shall apply to information held by another state or international organization which an authority has access to electronically if the authority cannot process the information according to binding EU legislation or an international agreement.” (Chapter 15 § 1 a)

- A new proposal has been tabled to ensure that Swedish authorities can fulfill international obligations concerning confidentiality and professional secrecy to the extent necessary for Sweden to participate in international cooperation.

“Secrecy shall apply to information that an authority has received from a foreign organization under binding EU legislation or an international agreement, and to information that an authority has collected in order to be submitted to a foreign organization in accordance with the corresponding legislation or agreement, if it can be assumed that Sweden’s ability to participate in international cooperation under the legislation or agreement is impaired if the information is disclosed.”

3.1.4 Absolute secrecy

10. A number of secrecy provisions do not lay down any special conditions for the applicability of secrecy to information mentioned in that context. One then usually refers to secrecy being ‘absolute’.

- Advice prior to the notification of mergers. This information from the parties to the authority is subject to absolute secrecy.

“Secrecy shall apply at the SCA to information concerning business or operational circumstances relating to advice prior to the notification of a concentration.” (Chapter 30 § 2)

Thus the SCA can neither confirm nor deny that a merger is about to be notified.

- Secrecy is also absolute in the activities of the SCA when it concerns activities regarding investigations, planning etc. based on international agreements agreed by parliament.

“Secrecy shall apply to information concerning a private party’s business matters or personal circumstances that the authority has at its disposal because of the agreement.” (Chapter 30 § 24)

The information exchanged within the European Competition Network, ECN, has been regarded as secret by the Administrative Court of Appeal with reference to this rule.

11. As described above the definition of confidential information refers to information of some definite kind, e.g. investigations by the SCA or business secrets. The information must have been obtained under certain circumstances, e.g. in the supervisory and investigatory activities of the SCA or under an international agreement.

3.2 *Some specific definitions of confidential information in competition investigations while others apply generally*

12. The Swedish Public Access to Information and Secrecy Act (2009:400) provides some specific provisions regarding confidential information in the activities of the SCA, namely Chapter 17 § 3 and Chapter 30 §§ 1-3. Other provisions are general for several agencies, for example Chapter 15 § 1.

3.3 *The source of the information may claim secrecy but the court decides*

13. When access to information is requested, or the authority is about to make information public in another way, the official responsible for the care of the document (the person handling a case or the registrar) considers whether the information may be disclosed. The authority will try to contact the private party concerned by the information to determine the possible risk of harm. The source of the information may claim secrecy and justify why the information should be kept secret by making the authority aware of the applicable secrecy provision and the possible harm that may occur. The authority makes the final decision.

14. If the official refuses to provide the information because the document is not official or is covered by secrecy, or supplies it subject to a reservation because it is partially secret, the matter must be referred to the authority for a formal decision if the applicant makes such a request. The applicant must be informed of the possibility to receive a formal decision from the authority.

15. The decision by the authority not to disclose information, or to grant access to official documents subject to reservations because of an applicable secrecy provision, is regarded as exercise of public power in relation to private parties. According to Swedish administrative law the decision can therefore be appealed. A person whose request has been rejected is normally entitled under the Freedom of the Press Act to request that the matter be reviewed by a court of appeal.