



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND
ADMINISTRATIVE PROCEEDINGS

-- Sweden --

16 February 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 16 February 2010.

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1. Introduction

1. The general Swedish legislation on public access to official documents is an effective guarantor for transparency. All official documents in competition files (antitrust and mergers) fall within the scope of this legislation. Consequently, the public at large may have access to official documents in individual competition investigation files. The right of access to official documents is, however, not unlimited. First of all - not all documents are official as they might be internal memoranda, in a preparatory stage etc. Secondly, there is no access to information which is secret according to the Swedish Secrecy Act.

2. Besides the principle of public access to official documents, there are specific provisions in the Swedish Secrecy Act (chapter 10 articles 3 and 4, 16 and 17) and the Swedish Administrative Act (article 16) providing a subject in an enforcement proceeding, with a more extensive right of access to file than the public at large. Specific criteria are stated as to if "party-access" shall be granted, and if not, for a party to be supplied with general information about the secret material's content to the extent necessary for the party to defend its rights.

3. A further guarantor for transparency is the general requirement on authorities to follow the rule on communication, stated in the Swedish Administrative Act (article 17). A case may not be decided unless the party, the subject to enforcements proceedings, has been informed about factual information submitted to the authority by other persons than the party himself and has been given the opportunity to express its view on such information.

4. The provision on communication in the Administrative Act does not stipulate when the subjects shall be granted access to file. The Swedish Competition Authority (SCA) applies this provision depending on the nature of the case. In mergers and cases regarding abuse of dominance, parties will often be granted access to file continuously throughout the investigation. It is very common that parties request to get access to replies by companies to inquiries. This often generates quite a workload for the case team since the SCA has to make a concrete assessment of each individual document for which access is requested. In cartel cases, the SCA will normally grant the parties access to file at the same time they receive the Authority's statement of objection.

2. How does your antitrust regime handle transparency with respect to the substantive legal standards; agency policies, practices and procedures; identity of the decision-makers; and the order and likely timetable of key proceedings

5. The substantive legal standards are found in the Swedish Competition Act (chapter 2 articles 1 and 7 in respect to restrictive practices and chapter 4 article 1 in respect to concentrations). The SCA uses its website as an active tool to enhance transparency and predictability of its antitrust procedures. The competition rules, both national and links to EU rules, as well as guidelines, procedures and names of the staff at the SCA, are published on the website (available both in Swedish and English). The registry and all decisions of the authority are also available on the website.

6. SCA guidelines covering both the SCA interpretation of substantive rules and procedural matters have been published in some areas (at present merger notifications and leniency applications) and can be found on the website. SCA policies are also published on our website, for example the SCA's priorities for investigating a suspected infringement of article 101 and 102 of the Treaty on the Functioning of the European Union and the corresponding articles in the Swedish Competition Act, as well as the SCA's priorities when investigating non-compliance with public procurement rules.

7. The average duration of procedures is published in the Annual Report. On the website information is also given on how merger notifications and complaints are handled.

8. The general principle of public access to official documents also encompasses information about pending cases, which means that the public at large may request access to such information. Upon request, the SCA will make an assessment whether the information requested is “official” or not and whether it falls within any of the provisions in the Secrecy Act. Detailed information about key proceedings in an individual case may however be considered confidential under the investigation phase.

3. Do the subjects of antitrust investigations have opportunities to meet with the agency at key points in the investigation? At what level? In what circumstances?

9. Those subject to an investigation by the SCA have plenty of opportunities, either on their own initiative or upon request by the SCA, to meet with the case team or other SCA staff if considered appropriate, and to make their points of view known. Meetings may occur at any time during the initial stage of the investigation and/or after the parties have received the SCA’s preliminary decision in the case or its preliminary draft for application to summons. (C.f. Statement of Objection in EU Commission proceedings). In addition, parties are offered to complement their written observations on the SCA’s preliminary decision at an Oral Hearing.

4. How and when are subjects of enforcement proceedings informed about the factual basis, economic theories and legal doctrines relevant to the allegations against them?

10. As already mentioned in the Introduction, a party has a specific right to get access to file and the SCA has an obligation to guarantee that communication of factual information is made and that the party is given an opportunity to respond to this information, prior to a decision. However, information during an investigation may be covered by secrecy, provided that it is of particular importance for the protection of the investigation to keep the information secret (chapter 17 article 3 in the Secrecy Act). This said, secrecy is normally applicable only during the first stage of the investigation in cartel cases but an assessment has to be made in every specific case of requests from a party for access to information on the file. It may be of extreme importance that the information is not revealed. When the SCA has sent its preliminary decision (statement of objection) to the investigated parties, this provision will no longer be applicable. At this time of the enforcement proceedings, the parties will have full access to all information upon which the Authority bases its decision.

11. Economic theories and legal doctrines relevant to the allegations against the parties will be revealed in the SCA’s preliminary decision, at the latest. Generally, however, the parties have already received this information during the course of investigation.

5. What opportunities do subjects of enforcement proceedings have to respond to the agency’s enforcement concerns? What opportunities do they have to make arguments and offer evidence, and what time constraints apply to these opportunities?

12. The subjects (defendants) and where relevant the complainants and intervening parties, can make their arguments and offer evidence at any time during the investigation. Defendants in antitrust proceedings typically have four weeks to respond to a preliminary decision or a statement of objection. In merger cases, this period may need to be shorter.

6. Is there an opportunity for a hearing prior to an agency decision? What rules apply to the hearing and hearing officer, and what rights does the subject of the enforcement proceeding enjoy?

13. As referred to in the answer to question 2, the parties will be offered to complement their written observations on the matters to which the SCA has objected in the statement of objection at a formal Oral Hearing. Both the Oral Hearing and the rights of the subject in the enforcement proceedings are governed

by the Administrative Act. There is no appointed "Hearing Officer", nor are there any specific provisions as to what person will chair such Oral Hearings, but in practice this will be done by a senior civil servant who is not directly involved in the case at hand. The general principle of public access to documents applies as well as the Secrecy Act.

14. It should be noted that the SCA is not entitled to prohibit a merger or decide on financial penalties for infringement of the competition rules except in cases that are not contested. When the SCA decides to bring a merger case or a cartel to the court of first instance, the Stockholm City Court, the enforcement proceedings are governed by the Swedish Code of Judicial Procedure.

7. Are there any limits on the length of an agency's investigation? Are there rules on the publication and content of the agency's adverse enforcement decisions, and on consideration of evidence offered by the subject of the investigation?

15. For antitrust cases, there are no other limits on the length of an investigation in respect of restrictive practices than the statute of limitations (5, ultimately 10 years) in the Swedish Competition Act. Merger control procedures must be concluded within the time periods defined in the Swedish Competition Act (one month for first phase and three months for an in-depth investigation at the SCA, a further six months for the court of first instance and a maximum, including the upper court, Marknadsdomstolen, of two years from the date of the concentration.

16. The Swedish Competition Act does not require the SCA to make its decisions public; neither adverse nor affirmative enforcement decisions. However, as mentioned in the Introduction, all official documents including the SCA's enforcement decisions, fall within the scope of the general Swedish legislation on public access to documents. In the interest of transparency, the SCA publishes all decisions and findings on its website.

8. Is the agency required to make any public announcement when an investigation is closed without taking an affirmative enforcement decision, or when an investigation is concluded by a settlement or consent decree? Are there rules on the content of any such announcements?

17. The SCA is not required to make any public announcement when an investigation is closed, or when an investigation is concluded by a settlement or consent decree.