

THE PUBLIC  
COMPETITION  
ENFORCEMENT  
REVIEW

FIFTEENTH EDITION

Editor  
Aidan Synnott

THE LAWREVIEWS

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ENFORCEMENT  
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Aidan Synnott

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# PREFACE

As detailed in the chapters that follow, competition enforcement remained quite active in many jurisdictions during the past year. Authorities around the globe devoted significant attention to merger control and to conduct matters – including abuse of dominance and cartel activity.

Enforcers in several countries and at the European Commission investigated and took action with respect to numerous transactions, and several deals saw concurrent investigations and other proceedings. In this regard, the discussions in the European Union and United States chapters detailing the actions against the Illumina–Grail transaction are particularly notable. An administrative law judge at the US Federal Trade Commission (FTC) determined that FTC complaint counsel failed to prove its *prima facie* case in challenging this deal. However, the European Commission prohibited the deal after it asserted jurisdiction pursuant to a referral from a Member State. There are other examples of divergent outcomes in the chapters that follow, including the differing treatment of the proposed Cargotec–Konecranes transaction by the European Commission (which approved the deal) and the US Department of Justice and UK Competition and Markets Authority (which effectively blocked it).

More generally, merger control activity in many jurisdictions remained robust. For example, as reported in the Brazil chapter, enforcers there reviewed a record number of mergers. Elsewhere, an amended competition law in Finland changed the merger notification thresholds there. There were also changes in the Turkish merger control regime, including a new provision broadening notification requirements for transactions regarding the acquisition of technology undertakings. In Italy, a new law expanded the powers of the competition authority and changed the test applicable in merger control investigations. There were other notable legislative developments, and the discussion of the passage of the Digital Markets Act and the Digital Services Act in the European Union chapter will be of particular interest.

Several jurisdictions saw notable cartel enforcement activity, with Brazilian, European Commission, Japanese and Portuguese authorities undertaking dawn raids. These actions targeted companies in online food delivery, water infrastructure, automotive, advertising and fashion industries, among others. Cartel activity related to the provision of goods or services to public entities received attention from several authorities, including the Canadian Competition Bureau and the US Department of Justice. Finnish, French and Swedish authorities also took several actions against cartels in the past year. Meanwhile, the General Court in the European Union dealt with several appeals from Commission decisions regarding alleged cartel conduct. Several enforcers, including the US Department of Justice and the European Commission, updated policies and guidance related to their leniency programmes.

Conduct-related enforcement actions against technology companies also featured prominently. Canada, the European Commission, France, Turkey and United States all moved forward with investigations and proceedings in this area. The Swedish competition

authority published a report regarding conduct in digital platform markets, concluding that ‘competition law may lack sufficient flexibility with regard to new types of markets’. The Turkish competition authority also issued a report on e-marketplace platforms, and the Taiwan Fair Trade Commission released a white paper on the digital economy.

Several authorities also brought abuse of dominance (or monopolisation) cases against companies outside the tech space – including against pharmaceutical firms. The French competition authority issued several fines for abuse of dominance, including against companies supplying electricity and gas. Conversely, the Italian Council of State annulled a fine that the competition authority had levied on energy companies there. In addition, several authorities, including those in Portugal, Turkey and the United States, continued to pursue labour-related enforcement activity.

We will continue to watch with interest to see how competition regulation and enforcement evolves around the globe in the coming year.

**Aidan Synnott**

Paul, Weiss, Rifkind, Wharton & Garrison LLP

New York

March 2023



# SWEDEN

*Peter Forsberg, Philip Thorell and Lars Lundgren<sup>1</sup>*

## I OVERVIEW

The Swedish Competition Act (the Competition Act)<sup>2</sup> entered into force on 1 November 2008 and governs all types of actions that may distort competition. The act contains rules against anticompetitive agreements and abuse of a dominant market position, modelled on Articles 101 and 102 in the Treaty on the Functioning of the European Union (TFEU), which applies in cases not affecting trade between Member States. It also contains rules on merger control and a prohibition against anticompetitive sales activities by public entities. The rules are interpreted in accordance with the case law of the Court of Justice of the European Union.

The Swedish Competition Authority (SCA) is the central administrative authority for enforcement of competition law in Sweden. It is entrusted with investigative and adjudicative powers, both of which have recently been expanded. The SCA can adopt decisions to prohibit mergers that harm competition, and as of 2021, the SCA's adjudicative powers have also been extended to behavioural cases (i.e., anticompetitive agreements and abuse of a dominant position) including the finding of an infringement and the imposition of corporate fines of up to 10 per cent of company turnover. The SCA's investigative powers during dawn raids were also extended in 2021 and the SCA was empowered to impose fines for procedural breaches during investigations (such as for obstructing a dawn raid). These adjudicative powers have gradually replaced the previous system whereby the SCA would have to apply at the Patent and Market Court (PMC) to prohibit a concentration or to impose a fine.

The SCA's decisions can be appealed to the PMC. The PMC's decisions and judgments can, in turn, be appealed to the Patent and Market Court of Appeal (PMCA). Leave to appeal is required if the PMCA is to hear a case. The PMCA is, in general, the court of final instance. However, in certain instances, the PMCA can grant leave for a judgment or decision to be appealed to the Supreme Court. If this were to happen, the Supreme Court would also need to grant leave to appeal before the case could be heard.

In addition to its enforcement activities, the SCA regularly conducts and commissions studies regarding sectors and markets perceived as suffering from limited competition. A current trend in the reports summarising these studies is the SCA expressing the need for new flexible tools that would complement existing legislation. The SCA has stated that new tools are required in order to tackle structural competition problems in entire markets, in particular where such problems are not limited to specific undertakings. The SCA has looked

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1 Peter Forsberg is a partner, Philip Thorell is a managing associate and Lars Lundgren is an associate at Hannes Snellman Attorneys Ltd.

2 The Swedish Competition Act (2008:579).

to both EU-level tools such as the Digital Markets Act (DMA) and to the tools available to the national competition authorities of other European countries, including the market investigations conducted by the Competition and Markets Authority of the UK.

## II CARTELS

Chapter 2 of the Competition Act holds the substantive provisions relevant for cartels and other anticompetitive agreements. Chapter 2, Sections 1 and 2 are modelled on Article 101(1) and 101(3) TFEU. Section 1 prohibits cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Section 2 sets out the possible exemptions to the prohibition found in Section 1.

The Swedish leniency programme was amended in 2014 to better reflect the EU leniency system. The new leniency regime introduced a marker system whereby a company may apply for a marker and submit limited information about an ongoing infringement. The minimum requirement to obtain a marker is to submit information on the market affected by the infringement, the other companies involved and the nature of the infringement. To secure the marker, the company must submit a complete application within a specified period. If the company with the marker fails to submit the outstanding information, another company cannot jump the queue for immunity. In circumstances where either the company benefits from leniency or the individual has contributed and personally cooperated to a significant extent, the SCA may grant immunity from a director disqualification.

### i Significant cases

#### *Dairy procurement – leniency cut-off point*

In December 2020, the SCA sued Arla Foods, Scandinavia's largest dairy company, and requested a fine of 1.1 million kronor for Arla having formed a bid-rigging cartel with a competitor (which later filed for bankruptcy) during a dairy framework agreement procurement. The SCA had ordered Arla Foods to provide information but before the deadline to respond, Arla Foods submitted a leniency application. The SCA claimed that Arla Foods' application did not meet the conditions for leniency, considering that the investigation had developed so far that the information supplied by Arla Foods did not add any added value. Arla Foods appealed the decision, claiming that its application did qualify for leniency. The PMC upheld the SCA's decision in October 2021.<sup>3</sup>

Arla Foods appealed to the PMCA, which confirmed the PMC's judgment in October 2022. The PMCA paid particular attention to the fact that a leniency application had to be submitted voluntarily and should, according to the preparatory works to the Swedish Competition Act, reveal non-permitted cooperation. With this in mind, the PMCA considered that information had to be provided on the company's own initiative to qualify for leniency.<sup>4</sup>

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3 PMC, judgment of 8 October 2021 in case No. PMT 20357-20.

4 PMCA, judgment of 6 October 2022 in case No. PMT 13071-21.

### ***Sanitation services – cartel***

In December 2022,<sup>5</sup> the SCA fined two sanitation companies, Sopkärilstvätt and Sanerings Companiet, after finding that the companies had agreed to not compete with one another. The parties had entered into an agreement not to compete, which inter alia resulted in the companies not submitting competing bids in public procurements. In addition, the companies had agreed to market each other's services to existing customers. After Sanerings Companiet submitted a leniency application in December 2020, the SCA conducted a dawn raid at Sopkärilstvätt's premises. Having found that the parties were competitors, the SCA concluded that the agreement was a restriction by object and fined Sopkärilstvätt 1.2 million kronor, the maximum amount accounting for 10 per cent of its turnover. As Sanerings Companiet had reported the cartel and thus brought it to the SCA's attention, Sanerings Companiet received full leniency and was not fined. Sopkärilstvätt has appealed the SCA's decision as regards the size of the fine.

### ***Transport service procurement – bid rigging***

In October 2022,<sup>6</sup> the SCA fined two taxi companies, Taxi Ulricehamn and Väner Taxi, approximately 1.6 million kronor in total for rigging bids in connection with a procurement for transport services by a municipality. The investigation was triggered by a tip-off from the municipality in question, which suspected collaboration owing to similarities in the tenders presented. In its investigation, the SCA found that there had been direct contact between the undertakings, in which the companies had agreed that Väner Taxi would submit a lower bid than Taxi Ulricehamn, while naming the owners of Taxi Ulricehamn as subcontractors. Taxi Ulricehamn had also instructed Väner Taxi on the prices it offered in its bid. The SCA considered that the communication at the very least amounted to a concerted practice, the object of which was to restrict competition. In the assessment of the size of the fine, the SCA considered the two companies' precarious economic and financial situation and therefore reduced the fines by 0.9 million kronor in total.

## **ii Trends, developments and strategies**

On average, the SCA conducts a handful of dawn raids a year, and it receives approximately five leniency applications yearly, of which approximately half are summary applications.<sup>7</sup> Sectors that have been investigated more recently include decontamination, retail, health and social care.

In December 2018, the SCA conducted a questionnaire survey of the level of corruption in the construction industry.<sup>8</sup> Among the responding firms, 49 per cent believed that there were cartels in the industry and 29 per cent of those believed that cartels operated on a regular basis.

During 2021, the SCA conducted dawn raids and opened an investigation into alleged price fixing of polymerase chain reaction tests (PCR tests) for covid-19. In a statement, the SCA expressed that PCR testing for covid-19 is an important public interest and the need for serious test providers and affordable tests warranted prioritisation of the investigation.

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5 SCA, decision of 1 December in case No. 121/2021.

6 SCA, decision of 20 October 2022 in case No. 569/2020.

7 During the period 2010–2014.

8 Report series 2018:10.

In 2022, the case was closed as the SCA's investigation showed that the discussions regarding cooperation between the undertakings were interrupted before an infringement of competition law had taken place.

### **iii Outlook**

The fight against cartels is one of the main priorities of the SCA, and measures relating to the detection of cartels has increased, especially concerning bid-rigging cartels in public procurement procedures. A concrete example is the above-mentioned case regarding two taxi undertakings that colluded in a transport service procurement.

In recent years, the SCA has met limited success in cartel cases and has issued relatively low fines. Whether the extension of the SCA's adjudicative powers in 2021 will affect its ability to win court cases remains somewhat unclear, as the October 2022 win before the PMCA against Arla was the final result of an application made by the SCA before the extended adjudicative powers entered into force.

## **III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE**

Chapter 2, Section 1 of the Competition Act prohibits the cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Chapter 2, Section 7 of the Competition Act sets out the prohibition against abuse of a dominant position. The provisions are modelled on Articles 101 and 102 TFEU.

### **i Significant cases**

#### ***Access to estate agent sales data***

In July 2021,<sup>9</sup> the SCA imposed an interim obligation on Svensk Mäklarstatistik, a company ultimately owned by the industry and member organisation for real estate agents, to supply estate agent sales data. The obligation was subject to a conditional fine of 2 million kronor. Svensk Mäklarstatistik had previously supplied data regarding real estate agents' sales to Valueguard. Valueguard used the data to establish its own price index for tenant-owned homes and detached houses in Sweden, and also published the data publicly on its website. In 2020, Svensk Mäklarstatistik terminated the agreement and refused renewal unless Valueguard agreed to stop publicly publishing the data. Valueguard complained to the SCA, which considered that there were no alternative data sources for Valueguard's activities and that Valueguard did not have the possibility to collect data on its own. An interim obligation to supply data was therefore considered necessary to uphold the market's confidence in Valueguard's price index. In February 2022, the PMC upheld the SCA's temporary obligation.

On 30 January 2023,<sup>10</sup> the SCA abandoned the investigation. According to the SCA, the investigation had shown that the data itself was unusual in terms of quality and as such necessary for Valueguard to provide its services. However, the SCA stated that there was no clear supporting evidence that Valueguard's publishing the data was crucial to customers'

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9 SCA, interim decision of 1 July 2021 in case No. 348/2021.

10 SCA, decision of 30 January 2023 in case No. 348/2021. Press release of 30 January 2023, [www.konkurrensverket.se/en/news/the-swedish-competition-authority-closes-the-investigation-concerning-svensk-maklarstatistik/](http://www.konkurrensverket.se/en/news/the-swedish-competition-authority-closes-the-investigation-concerning-svensk-maklarstatistik/).

demand for Valueguard's services. As Svensk Mäklarstatistik would continue supplying Valueguard with the data for uses other than publishing, the SCA did not consider that there was any need to continue investigating the issue.

### ***Stock exchange services – listing shares in companies without the companies' consent***

In June 2022,<sup>11</sup> the SCA issued an interim decision on the operator of the Stockholm stock exchange, Nasdaq, for abuse of dominant position under penalty of a fine of 50 million kronor. The case was triggered by a complaint from the Nordic Growth Market (NGM). According to the SCA, the likely abusive conduct consisted in Nasdaq's intention of offering trading of shares in companies listed on NGM Nordic SME, without prior consent from the companies. The SCA was of the view that Nasdaq's conduct could amount to an exclusionary abuse by harming the market structure of new growth markets. The SCA further concluded that as Nasdaq's conduct did not consider the companies' will, Nasdaq was using its position to the detriment of the companies who, deliberately and for different reasons, choose not to list their shares on Nasdaq's new growth market. In September 2022, Nasdaq announced that it, while awaiting new clarifying legislation, will refrain from offering trading of shares in companies listed on NGM Nordic SME, without the companies' prior consent. Against this background and considering that such legislation was not to be introduced in the near future, the SCA chose to abandon the investigation in October 2022.

### ***Accesses to aviation infrastructure***

The SCA opened an investigation into abuse of dominance by AFAB, which supplies on-land aviation infrastructure at Stockholm Arlanda airport. The SCA had received information that AFAB, or its parent companies in the aviation fuel sector, had actively limited access to aviation infrastructure at Arlanda airport. The SCA found that limitation of access to aviation infrastructure is principally governed by the Swedish Ground Handling at Airports Act and that the Swedish Transportation Agency is the government authority responsible for investigating breaches of the Act. Thus the SCA abandoned the investigation.<sup>12</sup> In March 2022, the Swedish Transportation Agency accordingly ordered AFAB to cease applying the requirement, coupled with a conditional fine of 14 million kronor on the company.

## **ii Trends, developments and strategies**

The SCA continues to investigate markets and sectors at risk of competition concerns. Certain sectors are scrutinised more closely by the SCA because of previous regulations that have created structural imbalances in the market (such as the pharmacy and telecommunications sectors). As abuse of dominance cases are difficult and resource-intensive, the SCA has formed a specialist division to deal with anticompetitive behaviour of this kind, the Market Abuse Unit.

## **iii Outlook**

In Sweden, many sectors have previously been characterised by a monopoly or few companies dominating the market. Many of these markets are now in the process of being, or have recently been, deregulated, which has often resulted in a market with non-existent, or low, competition. Consequently the SCA has focused its efforts on these markets.

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11 SCA, decision of 3 June 2022 in case No. 366/2022.

12 SCA, decision of 22 September 2021 in case No. 726/2020.

## IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

### i Significant cases

#### *Private digital healthcare providers and healthcare centres*

In its report<sup>13</sup> regarding the market for private digital healthcare services published in 2022, the SCA investigates how private digital healthcare services and the system for out-of-county compensation have affected competition in the primary care market. The report concludes that private digital healthcare services that are financed through out-of-county compensation are active on the same relevant market as healthcare centres, although healthcare centres are generally remunerated by a fixed sum per registered patient and digital healthcare providers are remunerated per visit.

The SCA concluded that having two compensation systems need not be a problem per se. However, the authority found that the healthcare centres were placed at a competitive disadvantage, as digital healthcare providers are compensated from the same budget as the healthcare centres. As competition is skewed, the SCA invited the regions to review the compensation for digital out-of-county care.

#### *Construction materials industry*

In 2021, the SCA published a report regarding competition in the construction materials industry. Initially, the report noted that the building materials industry consists of several different markets characterised by heterogeneous products and a large range of goods. The SCA's report provided, inter alia, that several important construction material markets have high levels of market concentration, and that systematic use of retroactive discounts occurs to an increasing extent in most parts of materials provision.

In the report, the SCA expressed the need for new tools to better deal with sectors with limited competition, for example, by allowing the SCA to investigate and intervene against market structures instead of the behaviour of individual companies. The SCA stated that the current rules do not provide sufficient possibilities to intervene against issues such as unilateral conduct by non-dominant undertakings or vertical agreements covered by the vertical block exemption regulation, and that this could be addressed by implementing a tool similar to the UK Competition and Markets Authority's market investigation tool. Last, the SCA considered that while it can order filings of concentration in certain cases, this is an obtuse tool as it presupposes that the SCA gains knowledge of the concentration well ahead of it having any effects on competition. To address this, the SCA stated that it would want the possibility to order undertakings to file any concentrations they are party to, as has been implemented in Norway.

#### *Digital platform markets and unfair trading practices*

In 2022,<sup>14</sup> the SCA published a commission research report regarding unfair trading practices on digital platform markets and the future regulation of such practices. The report identifies that certain issues, such as restrictions on access to data, can impede the establishment of competitive markets in the digital economy and the upcoming internet of things. The report emphasises that competition law may lack sufficient flexibility with regard to new types of

13 Report series 2022:3.

14 Commission research report 2022:6.

markets, where classical categories of abuse of a dominant position (such as refusals to supply) may not be applicable. The report considers several different tools that could be used to address this, such as a Swedish version of the DMA, or an implementation of similar market investigation rules as implemented in Iceland, Norway and the UK. The report states that a national equivalent to the DMA is not necessary, but that a similarly flexible competition tool would be useful to address sectoral issues in digital markets. The report considers that a competition tool inspired by the DMA and similar tools considered in other Nordic countries would enable the SCA to impose behavioural rules on all undertaking in a certain sector or even generally, where necessary to address competition being limited for structural reasons.

## **ii Trends, developments and strategies**

The SCA may commence a market study either on its own initiative or following a complaint. The study may result in an additional investigation of a specific undertaking or the provision of guidance to the undertakings concerned so that they can modify their behaviour to avoid an additional investigation. A concrete example of the latter is the SCA's study of gyms operated by the public sector in Sweden, which was released in July 2022. The report<sup>15</sup> illustrated that municipal gyms have a negative impact on competition on the local gym market. The report led to the SCA calling upon municipal gyms to ensure that they conduct business in a lawful manner.

## **iii Outlook**

Much like the European Commission, one of the SCA's priorities concerns the development of the digital economy and the sharing economy, and how the growth of these sectors will affect competition authorities' enforcement function, as well as the risk of anticompetitive conduct. The SCA has recognised that authorities' investigation methods are challenged with the increased digitalisation of the economy, as the competition rules need to be applied to digitalised (rather than offline) market conditions where, inter alia, data constitute a competitive advantage. It can be expected that the development of the e-economy and the sharing and digital economy will remain one of the SCA's main priorities. Other priorities of the SCA seem to be the pharmacy and pharmaceuticals market, which also aligns with the Commission's priorities.

## **V STATE AID**

There is no specific national legislation concerning state aid. However, procedural rules on the application of Articles 107–109 TFEU were adopted in 2013. In addition, the Local Government Act<sup>16</sup> states that giving support and financial aid to individual businesses is forbidden. According to Chapter 2 Article 8 of the Local Government Act, municipalities and counties are allowed to implement measures to promote local business in general but not to target their efforts towards a specific company.

The Swedish Transparency Act<sup>17</sup> is based on the state aid rules and requires reporting to the Commission of all publicly owned or financed operations reaching certain thresholds.

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15 Report series 2022:2.

16 The Local Government Act (1991:900).

17 The Swedish Transparency Act (2005:590).

**i Significant cases**

State aid cases are not common in Swedish courts. In particular, the cases have concerned the sale of facilities from municipalities to private operators below market price. Sweden has also been under review by the Commission multiple times, as only the Commission can approve targeted state aid.

***Barred enforcement of an arbitral award***

In 2019, the Nacka District Court upheld a decision by the Swedish Enforcement Agency barring the enforcement of an arbitral award. The Commission had, prior to the judgment, issued a decision whereby all payments in accordance with the arbitral award were to be considered prohibited state aid. The District Court held that the Commission's decision was to be considered binding unless overruled, and that the principle of sincere cooperation therefore prevented Swedish courts from issuing decisions in contravention of the Commission's decision. The Commission's decision would also, the District Court stated, prevent the application of the principle of *res judicata* to the arbitral award if applying the principle would mean upholding an infringement of EU law.

**ii Trends, developments and strategies**

The majority of previous state aid cases in Sweden have been related to municipalities selling property at significantly lower prices than market value. There has, however, been a decrease in the number of these cases in recent years.

The SCA has considered it unnecessary to submit a report to the Commission in accordance with the Transparency Act when the state or the municipalities do not control manufacturing undertakings with a turnover exceeding €40 million.

**iii Outlook**

Certain projects concerning infrastructure facilities in the more remote areas of Sweden are dependent on financial support and state aid. Those projects will depend heavily on authorisation from the Commission.

**VI MERGER REVIEW**

In previous years, the SCA reviewed 70 to 80 mergers a year, of which typically three or four went to Phase II. In 2021, there was a significant increase of merger reviews cases, 139 in total, with three cases going to Phase II review and two cases resulting in remedies.

A concentration meets the applicable merger thresholds and needs to be notified to the SCA if the combined aggregate turnover in Sweden of all undertakings concerned exceeds 1 billion kronor, and each of at least two of the undertakings concerned has a turnover in Sweden exceeding 200 million kronor.

Where the first threshold of 1 billion kronor has been met but the second threshold has not, the SCA may order the concentration to be notified if the SCA finds particular grounds for doing so. These grounds may be met when an undertaking already holds a strong market position and acquires a smaller or newly established undertaking. In these circumstances, the acquirer may also submit a voluntary notification. In general, the SCA encourages undertakings to make voluntary notifications of mergers.



## i Significant cases

### *Distribution and retail sales of medical products*

In May 2022,<sup>18</sup> the pharmacy operators Oriola and Euroapothea filed a concentration entailing the creation of a joint venture to which the two parties would transfer their pharmacy chains in Sweden to the new entity. Oriola was also active upstream in the market for distribution of pharmaceuticals. In June, the SCA cleared the concentration unconditionally after a Phase I review. Defining the relevant market, the SCA found that the product market comprised both physical and online pharmacies. This finding was in contrast to a 2015 decision where the SCA had found that online pharmacies constituted a distinct market from physical stores and was motivated by the increased number of online pharmacies as well as that the selection of medical products available online had grown significantly. In the material assessment, the SCA conducted a local market analysis showing that a significant impediment to effective competition would not be caused due to the horizontal relationship between the parties. Regarding the vertical relationship, the SCA found that a total input foreclosure was impossible owing to the legal requirement on distributors of prescription medicines to supply pharmacies. While the SCA found preliminary indications that Oriola had market power on the market for distribution of non-prescription medical products and other traded goods to pharmacies, the SCA concluded that consumers could easily switch to independent and vertically integrated distributors.

### *Optical products*

In March 2022,<sup>19</sup> the SCA opened a Phase II review of EssilorLuxottica-owned GrandVision's acquisition of Smarteyes. Both parties were active in the market for retail sale of optical products (such as eyeglasses and contact lenses), and EssilorLuxottica was furthermore active in the upstream market for wholesale of optical products. The SCA's investigation was motivated by that the concentration may enable EssilorLuxottica to foreclose other retailers by discriminating between GrandVision and Smarteyes on the one hand, and other retailers on the other. The Phase II investigation was extended by 30 days as GrandVision had failed to supply certain crucial information. In June 2022, the SCA announced its final decision, clearing the merger unconditionally. Relying on the same theories of harm as the Commission had done in its *EssilorLuxottica/GrandVision* decision,<sup>20</sup> the SCA stated that the investigation did not support the preliminary view that the concentration would cause vertical effects significantly impeding effective competition on the downstream market. Notably, the SCA for the first time considered not only total input foreclosure, but also partial input foreclosure (i.e., the possibilities for the merged entity post-concentration to increase prices or offer lower-quality goods and services to other retailers).

### *Materials for the construction industry*

In February 2022,<sup>21</sup> the SCA ordered S:t Eriks, a producer of construction products, to notify its acquisition of Meag VA-system. The parties both produced concrete products for water distribution and sewerage systems. Although the merger filing thresholds were not achieved,

18 SCA, decision of 29 June 2022 in case No. 397/2022.

19 SCA, decision of 27 June 2022 in case No. 128/2022.

20 Case M.9569, *EssilorLuxottica/Grandvision* (2021).

21 SCA, decision of 10 February 2022 in case No. 736/2021.

the SCA ordered a notification on specific grounds. Among other reasons, the SCA noted in its decision to order a notification that the parties' customers provided that the parties were two of four market leading actors. The customers also stated that in some parts of the country, S:t Eriks and Meag VA-system were the only suppliers of the products concerned. The SCA found that the market definition was not entirely clear and that the concentration may limit competition if the market was defined narrowly.

After having conducted further investigative measures, the SCA found that concrete products for water distribution and sewerage systems were substitutable with plastic products and that the market was at least national. The SCA concluded that the transaction would not significantly impede effective competition and cleared the concentration.

### ***Manufacturing and sales of drainage products***

In October 2022,<sup>22</sup> the SCA initiated a Phase II review of Vestum's acquisition of Isodrån and MDT Markvaruhuset. Both Isodrån and Vestum were active in the market for isolating drainage board. According to the SCA's initial investigation, it could not be ruled out that the concentration may harm effective competition on the market, inter alia as the parties' products relied on a different technical solution than those of their competitors. Moreover, the SCA stated that many customers considered there to be no alternatives to the products produced by the parties. Adding to this, the SCA also considered that there was no clear market definition and that sales data indicated that the parties' market share could have been very high, depending on the precise definition of the market.

After a lengthy Phase II review, Vestum abandoned the transaction of Isodrån upon receiving the SCA's draft decision to prohibit the concentration.

### ***Digital subscription services for magazines and newspapers***

In February 2023,<sup>23</sup> the SCA approved with conditions Bonnier's acquisition of Readly in Phase I. Readly is a provider of digital subscription services for magazines and newspapers, whereas Bonnier is the parent company in a group that publishes books, national and local newspapers and magazines. During the course of the investigation, competing publishers expressed their concern that Bonnier, after the concentration, would have the ability to discriminate in favour of its own titles on Readly's platform. Furthermore, there were concerns that Bonnier could use information about reading behaviour in relation to other publishers' titles or that Bonnier would not share data regarding reading activities to the same extent as today.

The commitment made binding on Bonnier entails that the undertaking, within seven years after the completion of the concentration, guarantees a continued competitively neutral treatment of publishers on Readly's platform, and specifically that the publishers get the same access to data regarding reading activities related to their own titles as today and that Bonnier does not utilise other publishers' data in an improper manner. The commitment was coupled with a conditional fine of 150 million kronor.

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22 SCA, decision of 7 October 2022 in case No. 594/2022.

23 SCA decision of 2 February 2023 in case No. 786/2022.

## **ii Trends, developments and strategies**

Over the past couple of years, the number of merger notifications has remained high in Sweden with a significantly increased influx in 2021. However, most were cleared in Phase I. Indeed, in cases with no vertical links or horizontal overlaps, the SCA often clears a transaction well ahead of its Phase I deadline of 25 working days. In average, it took 16 days to clear Phase I cases in 2021.

Another topic of interest is that the Swedish merger control regime makes it possible for the SCA to order filing a transaction if there are ‘particular grounds’ at hand and the parties have a combined turnover of 1 billion kronor. Although such orders remain relatively unusual, the SCA is likely to use this possibility where a concentration below the thresholds in a *prima facie* review indicates substantive issues. In these circumstances, the acquirer may decide to submit a notification voluntarily to pre-empt a filing order. In recent order decisions, the SCA has found particular grounds based on concerns from customers or competitors and high combined market share, especially in new markets. As noted above, the SCA has also expressed interest in an expansion of its power to order filings, and in particular to be able to order the filing of all acquisitions in a predetermined sector.

## **iii Outlook**

In 2018, the Competition Act was amended to grant the SCA extended decision-making powers in merger control cases. One argument for the reform was to increase conformity with the merger control procedure of the Commission and in other Member States. However, the reform did not receive a uniformly positive response and it has been argued that the safeguards surrounding the SCA’s decision-making process are not as well developed as, for example, the Commission’s. Additional amendments may be on the horizon as the SCA considers a more flexible application of merger control necessary to address competition issues in certain sectors such as data-driven markets.

## **VII CONCLUSIONS**

As stated above, the SCA has met limited success before the PMCA in recent years. As a result, the SCA has indicated that it will consider more carefully which cases it investigates and pursues in court. Indeed, in 2021 and 2022, the SCA has turned its focus to infringements of competition law by object. In the future, it is still unclear whether these cases indicate a long-term change in the priorities of the SCA or whether they are coincidental. Later sector reports of the SCA illustrate a focus on the pharmacy and pharmaceutical industry as well as digital markets, which is in line with current global trends and developments. However, there has been a limited number of cases with regard to these sectors, and it remains to be seen if this focus will be reflected in the SCA’s continued decisional practice as well. Simultaneously, the SCA has clearly indicated that it considers new tools necessary to address competition concerns of a structural nature. If new tools are indeed added to the SCA’s toolbox this will indubitably change the SCA’s enforcement policy.

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