The Public Competition Enforcement Review

Fifteenth Edition

Editor
Aidan Synnott

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Fifteenth Edition

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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

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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
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New York
March 2023

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Chapter 6

FINLAND

Mikko Huimala, Lauri Putkonen and Susanna Kyllöinen[1]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

In competition matters, the primary public enforcement authority in Finland is the Finnish Competition and Consumer Authority (FCCA). The FCCA cannot impose administrative fines but must make a fine proposal to the Market Court. The judgments of the Market Court can be appealed to the Supreme Administrative Court (SAC).

Finnish competition enforcement has undergone some changes in the past few years. The Competition Act[2] entered into force on 1 November 2011, replacing the former Act on Competition Restrictions.[3]

In November 2020, the Finnish government issued a bill to further amend the Competition Act,[4] with effect from 24 June 2021. The amendments mainly related to the imposition of fines and structural remedies, as well as strengthening the FCCA's investigative powers. For instance, the amendment has given the FCCA the option to impose structural remedies to end competition infringements, and the prerequisites for conducting additional inspections outside a business's premises have been eased. In addition, the maximum possible fine for associations of undertakings has been increased to 10 per cent of the combined turnover of the association and its members that operate in the markets affected by the association's infringement.

In September 2022, the Finnish government issued a bill to amend the Competition Act,[5] with effect from 1 January 2023. The amendments concerned lowering the merger control turnover thresholds. A notification to the FCCA is required if the combined turnover of the parties in Finland exceeds €100 million, and the turnover of each of at least two of the parties in Finland exceeds €10 million.

ii Enforcement agenda

The FCCA's Director General, Kirsi Leivo, began her term in September 2018. The Director General has publicly emphasised the importance of fighting cartels and the need for more severe sanctions. The Director General has also stated that the monitoring of public

1 Mikko Huimala is a partner, Lauri Putkonen is a senior associate and Susanna Kyllöinen is an associate at Hannes Snellman Attorneys Ltd. The original chapter was written by Tapani Manninen, a former senior adviser at Hannes Snellman.

2 948/2011.

3 480/1992 (annulled).

4 Government Bill 210/2020.

5 Government Bill 172/2022.

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procurement in Finland is one of the FCCA's main priorities. According to the Director General, it is necessary to find out why municipalities use directly awarded contracts instead of tendering, and how widespread the phenomenon is.[6]

In June 2021, the FCCA published a study according to which the current national turnover thresholds allow harmful mergers to escape the scrutiny of the FCCA. According to the FCCA's view, the obligation to notify mergers should be modified by lowering the current turnover thresholds and by granting the authority the right to require a notification when thresholds are not met. Further, the FCCA stated that expanding the merger filing obligation would create notable benefits to consumers.[7] This led to amendment of the Competition Act, with effect from 1 January 2023, and the new merger control turnover thresholds described above. However, the FCCA's proposed right to require notification where the turnover thresholds are not met was not included in the amendments.

In addition to the new thresholds, the notification form for mergers was updated and entered into use at the beginning of 2023. One of the main objectives of the change is to reduce the information requirements in acquisitions where the parties to the transaction have no or only a limited number of overlapping business or vertical links with each other.

Recently, the FCCA has paid more attention to trade associations and provided them with more guidance to support the planning of their activities and adherence to competition rules. The competition rules became stricter for trade associations after the ECN+ Directive,[8] especially as the fines imposed will be dictated by the turnover of the members and paying the fines can ultimately be the members' responsibility if the association is not solvent.

With regard to competition neutrality issues, the FCCA will maintain its supervisory powers over public sector entities, while aiming to deliver added social value to the Finnish economy and its consumers. In addition, the FCCA retains competence for legal supervision of public procurement, which was assigned to it at the beginning of 2017.[9] Consequently, since then the FCCA has opened numerous investigations into public procurement matters, with annual totals of between 57 and 101; for example, 62 investigations were opened in 2021. Statistics for 2022 had not been published at the time of writing.

II CARTELS

Finland has had a leniency programme in place since 1 May 2004. The programme was updated in the Competition Act, which entered into force in November 2011, and is now laid out in Sections 14 to 17 of the Competition Act. The leniency programme is very similar to the European Competition Network model leniency programme. In 2022, the FCCA issued revised leniency guidelines[10] that take account of amendments to the national leniency regime, based on the ECN+ Directive.

6 Hartikainen, Jarno: *Helsingin Sanomat* 10 December 2022.

7 The FCCA study on the potential need for legislative change regarding the national merger filing obligation.

8 Directive 2019/1/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

9 One of the most important aspects of this new task is the supervision of significant errors and omissions, such as illegal direct awards of contract.

10 Guidelines on immunity from and reduction of penalty payments in cartel cases: Guidelines on the application of the Competition Act (2022).

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The FCCA received its first leniency case only minutes after the entry into force of the programme in 2004.[11] However, after a spectacular start, there have been only a few leniency applications, which has clearly been a disappointment to the FCCA.[12] The relatively small number of leniency cases is reflected in the number of the FCCA's penalty payment proposals to the Market Court in cartel cases. In 2014, 2015, 2016, 2018 and 2019 the FCCA only brought one cartel case before the Market Court each year, while in 2013, 2017 and 2020 no cases were brought before the Market Court by the FCCA. In 2021, the FCCA submitted two penalty payment proposals to the Market Court; in 2022, there was again only one penalty payment proposal.

i Significant cases

SAC fines imposed on regional driving school association and three driving schools

On 21 November 2019, the FCCA submitted a proposal to the Market Court to impose a fine of around €300,000 in total on Uusimaa Driving School Association (the Association) and eight driving schools. According to the FCCA, the Association and six driving schools on the Association's board encouraged driving schools to raise their prices. According to the FCCA's proposal, the infringement began in April 2014 and continued until October 2015. In addition, three driving schools allegedly infringed competition rules by agreeing on price increases from the beginning of 2013 to the autumn of 2014.

On 15 December 2020, the Market Court gave its decision on the matter and found that the Association and two driving schools, Porvoon Autokoulu Oy and Eko-Center Liikennekoulutuspalvelut Oy (Eko-Center), had restricted competition by making anti-competitive price recommendations. The Market Court concluded that the infringement began in October 2014 and continued until October 2015. The fines ordered by the Market Court amounted to €20,000 (€6,000 for the Association, €12,000 for Porvoon Autokoulu and €2,000 for Eko-Center). The Market Court dismissed the FCCA's proposal with regard to the four other driving schools on the Association's board. In addition, the Market Court dismissed the FCCA's proposal regarding three driving schools alleged to have infringed competition rules by agreeing on price increases. The FCCA and the Association appealed the decision to the SAC.

The SAC gave its judgment on the case on 30 August 2021, mainly upholding the Market Court judgment. It dismissed the parties' claims based on alleged breaches of their defence rights. In addition, unlike the Market Court, the SAC took the position that the infringement consisted of two separate series, the first one having already begun in September 2012 but ending in February 2013, and the other one lasting from October 2014 to October 2015. The SAC concluded that the Association and Porvoon Autokoulu had infringed competition law in both periods, with Eko-Center and Autokoulu Hakala responsible for only the latter infringement. The SAC decision, like the Market Court's, dismissed the FCCA's proposal regarding price cartel conduct. The SAC imposed penalty payments of €44,000 in total (€10,000 for the Association, €25,000 for Porvoon Autokoulu, €3,000 for Eko-Center and €6,000 for Autokoulu Hakala), significantly lower than initially proposed by the FCCA.

11 The application was made in the *Raw Wood Procurement* infringement case.

12 According to Government Bill 88/2010 (p. 23), there had been approximately 10 leniency applications by June 2010.

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Alleged cartel in the HVAC infrastructure market

On 9 September 2022, the FCCA proposed that the Market Court impose penalty payments of €44 million in total on six HVAC infrastructure wholesalers for their alleged prohibited cooperation in the Finnish market for plastic HVAC infrastructure pipeline products in 2009–2016. The FCCA claimed that the aim of the cooperation was to anticompetitively maintain their own market positions and to restrain price competition in the market. According the FCCA's proposal, two of the largest manufacturers of plastic HVAC in pipeline products in Finland and four of the largest wholesalers selling infrastructure pipeline products all acted in mutual understanding restricting the manufacturers from trading directly with customers and allocating the sale of the manufacturers' products to the wholesalers. In addition, the wholesalers allegedly refrained from selling competing products. The case is currently pending before the Market Court.

Alleged cartel in the real estate management industry

On 10 February 2021, the FCCA submitted a proposal to the Market Court to impose penalty payments of €22 million in total on six real estate management companies and the Finnish Real Estate Management Federation for their suspected engagement in a price-fixing cartel from 2014 to 2017. The FCCA claimed that the parties mutually agreed to harmonise their prices and price increases, and additionally sought to raise price levels in the industry in general. According to the FCCA's proposal, the collusion between the Federation and the real estate management companies took place at seminars and Federation board meetings. Information on price increases and harmonisation was indicated to member companies and the entire real estate management sector through, for instance, press releases, events and the association website.

On 15 December 2022, the Market Court gave its decision on the matter and found that the Finnish Real Estate Management Federation and six real estate management companies had a nationwide collaboration in price-fixing from 2014 to 2017. The fines ordered by the Market Court amounted to €4.93 million, significantly lower than the FCCA's proposal. Further, the Market Court concluded that the activity had not been as intense and extensive as the FCCA had claimed. The Finnish Real Estate Management Federation decided not to appeal and issued a public apology. The case is currently pending before the SAC as the FCCA and three real estate management companies appealed the Market Court's decision.

Alleged bid rigging in public transport

On 27 September 2021, the FCCA concluded its investigations into alleged bid rigging in public transport in the Turku region, proposing that the Market Court impose a total of €1.9 million in penalty payments on six companies. Through their joint ventures, the competitors had submitted three joint bids in the competitive tendering processes for public transport services in 2013, 2014 and 2016, actions that the FCCA considered to be in breach of competition law. According to the FCCA's findings, the companies had committed to refrain from price competition between themselves and to divide in a predetermined manner the transport contracts won in the tenders. Moreover, the FCCA also considered that the parties had the capability to provide services individually. The case is currently pending before the Market Court.

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Market Court penalty payments imposed on two undertakings for building-insulation market cartel activity

On 3 March 2021, the Market Court imposed penalty payments amounting to a total of €3.2 million on two companies (€2 million for Jackon Finland, formerly known as Thermisol Oy, and €1.2 million for UK-Muovi, now known as Inora) for their involvement in a price-fixing cartel between November 2012 and summer 2014 on the production market for expanded polystyrene (EPS) insulation used in buildings. The fines imposed by the Market Court were only slightly below the level of those proposed by the FCCA in December 2018 (€4 million in total). The third cartel member, Styroplast, received full immunity from the fines through the leniency procedure. In its judgment, the Market Court concluded that the parties, who held around 80 per cent of the market share in the EPS insulation market in Finland, had mutually agreed to increase product price levels by 5 per cent. Price increases were also to be monitored subsequently. UK-Muovi appealed the judgment to the SAC, but for Jackon Finland, the Market Court decision remained final.

On 1 July 2022, the SAC issued a decision according to which there were no grounds for changing the outcome of the Market Court decision for UK-Muovi either.

ii Trends, developments and strategies

As discussed above, the fight against cartels continues to be one of the FCCA's main priorities. The detection of cartels has been boosted by increasing cooperation between the competition authorities and the contracting entities responsible for public procurement. The FCCA has announced that it will bring all detected cartel infringements before the Market Court.[13] Corresponding to EU rules, the fine is limited to 10 per cent of the turnover of the company (its entire group).[14] The FCCA's Director General has publicly emphasised the need for a higher level of fines than has been imposed by the courts in practice, arguing that higher fines would have a stronger deterrent effect, and welcomed the idea of criminalising cartel conduct in Finland. According to the Director General, there is a need in Finland to adopt guidelines on the method of setting fines similar to those adopted by the Commission.[15]

Private enforcement of competition law has seen activity levels dwindle in recent years. However, before that, several landmark cases passed through the courts. In the Asphalt cartel case, the Helsinki District Court dismissed the damages claim of the Finnish state in its entirety but awarded damages to a number of municipalities. While the claims of the state and of several municipalities were settled by the parties after the judgment of the Court of Appeal, a number of applications for leave to appeal were filed to the Supreme Court. The Supreme Court dismissed the majority of the applications and granted limited leave to appeal to one respondent and one claimant in September 2017. Some applications for leave to appeal were left in abeyance until final decisions are given in the matters in which leave to appeal was granted. The Supreme Court subsequently granted one respondent further leave to appeal in August 2018 and November 2018.

In December 2017, the Supreme Court made a reference to the European Court of Justice for a preliminary ruling regarding the question of economic succession in determining

13 FCCA press release, 20 February 2012.

14 The highest cartel fines in Finland to date were imposed in the *Asphalt* case in 2009 (totalling €82.6 million). For example, the fines in the *Raw Wood Procurement* infringement case in 2009 amounted to €51 million in total.

15 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003.

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the parties liable for damages. In its preliminary ruling on March 2019, the European Court of Justice (ECJ) ruled that Article 101 of the Treaty on the Functioning of the European Union (TFEU) must be interpreted as meaning that where the infringing economic unit had been dissolved, a company acquiring the commercial activities of the dissolved company and continuing those activities may be held liable for the damage caused by the infringement. In addition, the ECJ stated that the concept of 'undertaking' cannot have two different dimensions when considering penalty payments and damages.[16] In October 2019, the Supreme Court applied the principle of economic continuity accordingly as set out by the ECJ, concluding that the economic successors of cartel companies are liable for the damage caused by acquired companies involved in the cartel. The Supreme Court repealed the judgment and referred the case back to the Court of Appeal for evaluation of other prerequisites for liability and the amount of damages.[17] The case is still pending before the Court of Appeal. Further, significant damages cases concerning an infringement involving the procurement of raw wood came to an end in January 2019, when the Supreme Court dismissed an application for leave to appeal by one of the claimants.

In June 2019, the SAC made a reference to the ECJ for a preliminary ruling in the power line cartel case. The Market Court had dismissed the FCCA's penalty payment proposal in March 2016 on the grounds that it had been submitted after the five-year time limit.

The SAC sought to ascertain, in substance, at what point in time the alleged participation of an undertaking in an infringement of Article 101(1) of the TFEU is regarded as having ended. The FCCA had argued that the cartel should be considered to have lasted until the final instance of the contract price was paid. In January 2021, contrary to the FCCA's view, the ECJ held that the duration of the participation of one defendant in the alleged infringement covered the entire period during which that defendant undertaking implemented the anticompetitive agreement entered into with its competitors, including the period during which the fixed-price offer submitted by that undertaking was in force or could have been converted into 'a definitive works contract' between the defendant and contracting authority. Ultimately, the ECJ held that it was for the national court to determine 'the date on which the essential characteristics of the relevant contract and, in particular, the total price to be paid for the work' were finally laid down.[18] In August 2021, the SAC concluded that the date on which the essential elements were laid down occurred more than five years before the FCCA's proposal to the Market Court. This meant that the proposal had been submitted after the expiry of the five-year limitation period and was therefore time-barred.

iii Outlook

It seems clear that the FCCA will continue to focus on the investigation of hardcore cartels. Under the prioritising rule of Section 32 of the Competition Act, the FCCA does not need to conduct an in-depth investigation if an infringement is deemed unlikely at the outset or, irrespective of the infringement's likelihood, if competition is considered effective on the whole.

16 Case C-724/17.

17 2019:90.

18 Case C-450/19.

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III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Sections 5 and 7 of the Competition Act set out the prohibited restraints on competition and abuse of dominant positions respectively. The Sections have been harmonised with Articles 101 and 102 of the TFEU.

The FCCA has made only a handful of penalty payment proposals to the Market Court in dominance cases. In most of the few cases brought to the Market Court, the level of fines has been modest. FCCA Section 7 investigations have typically lasted a long time and ended with the FCCA closing the case without further measures. This experience has been equally frustrating for both the targeted undertaking and the complainant.

However, the FCCA has made one significant fine proposal in a dominance case to the Market Court in recent years. In December 2012, the FCCA proposed that the Market Court impose a fine of €70 million on Valio. The Market Court rendered its decision in the case in summer 2014. The decision of the Market Court became final when the SAC dismissed Valio's appeal in December 2016. Arla lodged a damages claim of €58 million against Valio before the Helsinki District Court, but the parties settled the matter in September 2018. Other claims were also lodged but only two of them were not settled between the parties. In June 2019, the Helsinki District Court awarded damages to two milk producers' cooperatives, Maitomaa and Maitokolmio. However, the damages awarded (totalling €8 million) were substantially lower than the ones claimed (totalling €27 million) as the cooperatives failed to fulfil their burden of proof regarding the amount of suffered damage. The judgments are final.

In 2022, the FCCA issued two decisions regarding alleged restraints on competition, without finding an infringement of competition. In one of these cases, there was an alleged abuse of dominant position in the software services market. With reference to the prioritising rule of Section 32 of the Competition Act (see Section II.iii), the FCCA decided not to investigate, since the matter was found to be more a dispute than a competition law matter.

The other case was a returned case from the Market Court. In 2020, the FCCA was requested to investigate whether forest companies had engaged in horizontal cooperation in violation of the Competition Act when complying with Forest Stewardship Council certification rules. Previously in 2020, the FCCA had not continued the investigation. The decision was appealed to the Market Court, overturned, and returned to the FCCA. According to the Market Court, the FCCA's decision did not meet the conditions set for an administrative decision under Sections 44 and 45 of the Administrative Law (434/2003), as it did not sufficiently disclose the facts based on which the FCCA had concluded not to continue investigations. In its 2022 decision, the FCCA still concluded that, based on the preliminary investigation, it was likely that the procedure presented in the request did not, as defined by section 32 subsection 2 point 1 of the Competition Act, involve a prohibited restriction of competition as referred to in section 5 or 7 of the Competition Act or articles 101 or 102 TFEU. Entrepreneurs can choose which certificates are necessary for their business, regardless of competition legislation.

i Significant cases

Restraints on competition

FCCA penalty payment proposed for IKH for resale price maintenance

On 20 May 2020, the FCCA proposed that the Market Court impose a penalty of €9 million on Isojoen Konehalli Oy (IKH) for engaging in illegal resale price maintenance. IKH is an import and hardware company selling products directly to consumers and retailers. According

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to the FCCA's proposal, IKH had set recommended prices for the products it sells and had also pressured retailers to comply with its recommendations in different ways. In practice, this had prevented price competition between IKH's retailers and increased prices for the products sold to customers. The FCCA argued that the infringement began in 2010 and is still ongoing in certain respects.

In its decision of 11 August 2022, the Market Court imposed a penalty fee of €1.75 million for illegal resale price maintenance. Continuing the trend of the past few years, the penalty fee imposed by the Market Court is significantly lower than the one proposed by the FCCA. The Market Court considered that IKH imposed retail prices for its retailers in their online stores from March 2010 to February 2015 and agreed with its retailers on fixed resale prices from 2014 to 2020. According to the Market Court, the evidence presented by the FCCA was not sufficient for all the claims in the penalty payment proposal. Both the FCCA and IKH appealed the decision to the SAC.

Abuse of dominance

In 2022, there were no investigations made public by the FCCA regarding the abuse of dominance. In 2021, the FCCA closed two investigations regarding suspected abuse of dominance by the Helsinki Regional Transport Authority (HSL). MaaS Global Ltd alleged that HSL had abused its dominant position, inter alia, by refusing to supply certain ticket products and by excessive pricing. The request for action was later withdrawn by MaaS Global Ltd and the FCCA did not see a need to continue investigations independently.

ii Outlook

As noted above, the Competition Act contains a provision on prioritisation of the FCCA's activities. Even before the entry into force of the prioritisation provision in Section 32 of the Competition Act, the FCCA closed a majority of its dominance investigations without further measures noting, inter alia, that its role is not to solve individual contractual disputes between parties but to ensure the functioning of the market and healthy competition.[19] Section 32 codifies the practice and grants the FCCA a right to eliminate more quickly cases that have only a minor impact on the economy.

The FCCA has applied the prioritisation provision regularly and is expected to continue to do so in the future. As a result of the provision, the FCCA is able to focus on the more serious restraints on competition.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Chapter 4a of the Competition Act entrusts the FCCA with a supervisory task to enhance competition neutrality between public and private businesses. Pursuant to Chapter 4a, the FCCA has the power to intervene in the business activities of the municipalities, the joint

19 See, for instance, decisions of the FCCA in *Liikennevakuutuskeskus* of 20 December 2012, record No. 130/14.00.00/2011, *Fonecta Oy* of 1 October 2012, record No. 452/14.00.00/2011, and *Alko Oy, Stella Wines Oy* of 19 March 2012, record No. 764/14.00.00/2011.

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municipal authorities and the state, as well as the entities over which they have control, if a public sector entity is distorting the conditions for competition or preventing the establishment or development of competition on the market.

In May 2017, the FCCA published guidelines on market-based pricing to help public sector entities assess the competition neutrality of their own activities.[20] The guidelines describe the principles and measures employed by the FCCA in the supervision of pricing, which consists of assessing both the setting of prices and the economic activity of the public sector entities.

So far, the FCCA has published 16 decisions concerning competition neutrality, with no new cases published in 2022.

i Significant cases

In the most recent competition neutrality case from July 2021, the FCCA investigated the activities of the City of Tampere and its subsidiary Finnpark Oy in the parking market. According to the FCCA's assessment, Finnpark had been able to receive public support for its real estate business as a result of measures linked to the City of Tampere's parking policy. According to the FCCA, this aid could distort competition between Finnpark and its private competitors by passing on the real estate business to the parking business. To prevent distortions of competition, Finnpark, among other things, separated the real estate business from its other activities in its accounting. Following the remedies taken by Finnpark, the FCCA no longer considered it likely that significant distortions of competition would occur, and it closed its investigation.

ii Outlook

The FCCA has announced that it will focus on developing the identification and surveillance of industries suffering from weak competition and intervene with activities maintaining and enhancing passive competition and anticompetitive coordination within sectors where competition is weak. In October 2017, the FCCA announced that it was investigating certain companies operating in the social welfare and healthcare market. The inspections were carried out in August 2017 with the purpose of determining whether these companies had impeded competition when they participated in tender processes. According to public sources, the investigation is still ongoing. In recent years, the FCCA also took an interest in the taxi market and conducted studies and investigations. The pharmacy market has also been under scrutiny and, in 2020, the FCCA published an extensive study on the market stating, inter alia, that price competition between pharmacies should be encouraged by setting price caps for certain medicines so that pharmacies could compete by reducing their margins. In addition, to increase competition and improve access to pharmacy services, the FCCA suggested in 2021 that the pharmacy market should be further developed by enabling pharmacy businesses to operate solely in online environment. The FCCA also proposed abolishing tax subsidies for bonuses awarded in the banking and insurance sectors, which are tax exempt when used for service or insurance premiums with the same company, because this distorts competition between insurance companies.

20 The FCCA's Guidelines on Market-Based Pricing, 2017.

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V STATE AID

There are no national rules on state aid and the applicable rules are those laid down in Articles 107 to 109 of the TFEU. However, there are procedural rules concerning, inter alia, the recovery of unlawful state aid and the European Commission's inspection powers, the duty to notify state aid to the Commission and certain exemptions from this duty (e.g., the *de minimis* rule and the general block exemption regulation).

Furthermore, the Act on the Openness and Obligation to Provide Information on Economic Activities Concerning Certain Undertakings that applies to companies carrying out services of general economic interest facilitates the Commission's ability to monitor competition and state aid rules in Finland.[21]

The contact point for the Commission in state aid matters is the Ministry of Economic Affairs and Employment. The FCCA does not have a role concerning state aid.

i Significant cases

State aid during the covid-19 pandemic and Russia's invasion of Ukraine

Following the coronavirus outbreak, several Finnish support measures to help companies during the pandemic were approved in 2020 and 2021 under the European Commission's State Aid Temporary Framework.[22] For instance, the aviation sector in Finland was hit hard by the pandemic and, subsequently, the major airport operator and the national airline received support from the state.

In March 2021, the European Commission approved Finnish aid to Finnair in the form of a €351.38 million hybrid loan. The loan was granted to compensate Finnair for damage caused by the necessary travel restrictions imposed to limit the spread of the coronavirus. The Commission evaluated the measure pursuant to Article 107(2)(b) of the TFEU, according to which the Commission may approve state aid measures whereby Member States may compensate damage caused as a result of exceptional circumstances. The Commission ensured that Finnair's third aid measure would not lead to an accumulation of state aid, taking into account the state aid previously received by Finnair. Therefore, by March 2021, the Commission had approved three Finnish support measures for Finnair within a period of less than one year. The first measure, the state guarantee, secured sufficient liquidity for Finnair to enable it to maintain continuity in its financial operations during and after the pandemic. In June 2022, Finland notified amendments to the measure and prolonged the state guarantee from three to six years. The second measure, the recapitalisation, strengthened Finnair's equity and encouraged market investments. In turn, the hybrid loan arrangement compensated Finnair for damage caused by the necessary travel restrictions.

In June 2022, the European Commission approved a €500 million Finnish scheme to support companies in the context of Russia's invasion of Ukraine. The scheme was approved

21 See the Act on the Application of Certain State Aid Provisions of the European Union (300/2001), Government Decree on the Notification Procedures concerning State Aid to the Commission (89/2011) and the Act on the Openness and Obligation to Provide Information on Economic Activities Concerning Certain Undertakings (19/2003).

22 Communication from the Commission Temporary Framework for State aid measures to support the economy in the current covid-19 outbreak 2020/C 91 I/01 (OJ C 91I, 20 March 2020, pp. 1–9), as amended.

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under the State Aid Temporary Crisis Framework.[23] Companies of all sizes and active in all sectors affected by the current geopolitical crisis and the related sanctions, with the exception of the financial, primary agricultural, aquaculture and fisheries sectors, were entitled to apply for the aid.

In the energy sector, in October 2022 the European Commission approved Finnish liquidity support in the form of loans to electricity producers with a production capacity of at least 100MW and other producers with regional importance, significance, or criticality in electricity markets in Finland under the Temporary Crisis Framework. The estimated budget for the measure was €10 billion.

The European Commission also approved in October 2022 liquidity support to municipal electricity companies in the form of subsidised loans granted by municipalities or Municipality Finance plc under the State Aid Temporary Crisis Framework to ensure the continuity of the energy sector's operations. The total estimated budget of the measure was €5 billion. The decision was effective until the end of 2022, but on 21 December 2022 the European Commission approved an extension to the scheme and the amendments are in place until the end of 2023.

Illegal state aid awarded to Helsingin Bussiliikenne Oy

A case concerning alleged illegal state aid to Finnish bus transport company Helsingin Bussiliikenne Oy (HelB) is currently pending appeal before the European Court of Justice.[24] In June 2019, the European Commission concluded its investigations and found that HelB had received €54.2 million of incompatible state aid from Finland. The European Commission opened its in-depth investigation in 2016 after receiving a complaint alleging that the conditions of loans granted to HelB by the Finnish authorities were not on market terms.

The European Commission's investigation confirmed that private market creditors would not have granted the loans under the same terms and conditions (for instance, very low interest rates), particularly considering the financial difficulties HelB was facing at the time the loans were granted. Subsequently, the European Commission considered the loans to constitute state aid in breach of EU rules, and Finland was ordered to recover the aid from HelB. During the investigation, HelB's assets and business operations were sold to one of its competitors. According to the Commission, the new owner became the economic successor to HelB and therefore also became responsible for repaying the incompatible state aid.

The European General Court gave its judgment on 14 September 2022.[25] The General Court confirmed that HelB must repay €54.2 million in state aid and upheld the European Commission's decision. The European Commission's view on the economic continuity between HelB and the new owner was also confirmed. HelB appealed against the judgment of the General Court on 11 November 2022.

23 Communication from the Commission on the Temporary Crisis Framework for State aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 131 I, 24.3.2022, p. 1), as amended by Commission Communication C/2022/5342 (OJ C 280, 21.7.2022, p. 1).

24 Case C-697/22 P.

25 Case T-603/19.

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ii Trends, developments and strategies

In general, practices concerning the application of EU state aid rules are gradually being formed, and national courts are increasingly applying state aid rules. For instance, the SAC has annulled several administrative court decisions partly because the courts have omitted to consider the applicability of the state aid rules or to follow the relevant procedures in their decision-making. The cases concerned, inter alia, district heating, the sale of land and guarantees.[26]

iii Outlook

In June 2017, the Finnish Media Federation, an advocacy organisation for the Finnish media industry and printing companies, lodged a complaint to the European Commission claiming that the public funding of Yleisradio Oy's (Yle) textual journalistic online content constitutes prohibited state aid. Yle is a national media company owned mostly by the state and its operations are funded primarily through the Public Broadcasting Tax. According to the Finnish Media Federation, the provision of textual journalism online is not to be considered broadcasting under the Amsterdam Protocol and the Commission Communication on public service broadcasting.[27] Instead, the services in question should be evaluated under the EU doctrine for services of general economic interest. The Finnish Media Federation argued that since a private supply of these services already existed in the Finnish market, there was no need to qualify textual journalistic online content as a service of general economic interest. In addition, the production of Yle's wide textual journalistic online content leads to a disproportionate distortion of competition.

Following the complaint, the Finnish authorities engaged in informal discussion with the European Commission. Further, a governmental proposal submitted to Parliament in December 2020[28] recommended that the Act on the Finnish Broadcasting Company be amended so that the text-based online content published by Yle would be more closely linked to its audio or video content broadcasts. The proposal's aim is to specify Yle's role as a public service media house and to bring the regulation on the company into line with EU state aid regulation. The amended Act on the Finnish Broadcasting Company entered into force on 1 August 2022.

VI MERGER REVIEW

In the 2011 reform of the Competition Act, the provisions on merger control were revised with the purpose of harmonising them further with EU rules. Most notably, the dominance test applied under the old rules was replaced by the significant impediment of effective competition test, which was introduced to enable the FCCA to shift the focus of its review more towards the competitive effects of mergers. A new amendment process began in 2015,

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26 See, for instance, judgments of the Supreme Administrative Court of 1 July 2019, record No. 3086; 16 February 2018, record No. 673; 13 May 2015, record No. 1234; 23 January 2014, record No. 148; 30 November 2012, record No. 3326; 9 February 2012, record No. 192.

27 Protocol on the system of public broadcasting in the Member States (OJ C 340, 10 November 1997) and Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 257, 27 October 2009).

28 Government Bill 250/2020.

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as a result of which the calculation of deadlines in merger control changed and merger control timelines are now calculated in working days instead of months. The amendments entered into force on 17 June 2019.

Under the merger control provisions, a concentration shall be notified to the FCCA if the combined aggregate worldwide turnover of the parties exceeds €350 million; and the aggregate turnover of each of at least two of the parties accrued from Finland exceeds €20 million.

The rules concerning the calculation of the turnover correspond to a large extent with the provisions of the EU Merger Regulation.

Once a concentration has been notified to the FCCA, it has 23 working days to investigate and either clear the concentration (possibly with conditions) or initiate a Phase II investigation. If a Phase II investigation is opened, the FCCA has an additional 69 working days (the Market Court may extend the deadline by a maximum of 46 working days) to approve the concentration with or without conditions, or to request the Market Court to prohibit it. If the FCCA requests such a prohibition, the Market Court must decide either to clear the concentration with or without conditions, or to prohibit it within three months.

The majority of notified concentrations are cleared in Phase I. In 2022, the FCCA issued 38 merger decisions and Phase II investigations were initiated in three cases.

i Significant cases

Conditional FCCA approval for acquisition of Fysios Holding Oy by Mehiläinen Oy

On 20 January 2022, the FCCA conditionally approved Mehiläinen Oy's acquisition of Fysios Holding Oy. Mehiläinen offers health and social services and operates in the healthcare and social services market. Fysios is a national provider of therapy services.

Based on the FCCA's investigations, the acquisition by Mehiläinen of Fysios would have had adverse competitive effects in the market for physiotherapy for self-paying private customers in the area of the city of Vaasa. According to the decision, Mehiläinen's market share in Vaasa would have increased considerably following the acquisition, and there would have been insufficient competition in the market as a result of the acquisition.

To resolve the competition concerns identified by the FCCA, Mehiläinen committed selling part of Fysios' physiotherapy business in Vaasa to a third party. This was the first case in the history of Finnish merger control where the commitment was implemented by a 'fix-it-first' remedy. Accordingly, the parties found a suitable buyer for the divested business and entered into a binding agreement during the FCCA's investigation. With the approval of the FCCA, Fysios' business operations in Vaasa were sold to Pihlajalinna Lääkärikeskukset Oy.

Conditional FCCA approval for acquisition of Jackon Holding AS by BEWI ASA

On 1 July 2022, the FCCA conditionally approved BEWI ASA's acquisition of Jackon Holding AS. BEWI and Jackon are both Norwegian industrial companies that operate internationally and manufacture and sell insulation, packaging and component products mainly from EPS, XPS and EPP materials.

Based on the FCCA's investigations, the acquisition would have harmed competition in the Finnish heat and iron EPS insulation market. According to the FCCA, the market was already very concentrated, and the parties' combined market share would have increased significantly because of the acquisition. In its press release, the FCCA also noted that a cartel has previously been detected in the EPS insulation market and the market has numerous features that facilitate tacit collusion and consequently reduce competition. With regard

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to the XPS insulation market, the FCCA found that even though the production of XPS insulation is concentrated in Finland, there was still enough competition in the market even after the acquisition.

The condition for accepting the acquisition was that BEWI divest its EPS insulation business in Finland. The commitment to divest the subsidiary was enhanced with an upfront buyer requirement. The FCCA used upfront buyer requirement for the first time in the conditional approval of Altia Oyj/Arcus ASA merger in 2021. The FCCA has stated that it will continue to impose the upfront buyer requirement in the future.

ii Trends, developments and strategies

The FCCA published a report in June 2021 in which it proposed expanding the obligation to notify mergers. In the report, the FCCA proposed that the current merger control turnover thresholds be lowered and that the authority be granted the right to require notification even when the thresholds are not met. According to the report, should the proposed right not be granted to the authority, the turnover thresholds should be lowered even further than proposed. In addition, filing thresholds based on transaction value should be considered.

The amended Competition Law came into force on 1 January 2023. A notification to the FCCA is now required if the combined turnover of the parties in Finland exceeds €100 million, and the turnover of each of at least two of the parties in Finland exceeds €10 million. However, the FCCA's proposed right to require a notification even when the turnover thresholds are not met was not included in the amendments. As a result of the new thresholds, the FCCA estimates that there will be about 30–40 new notifications each year and about three more new Phase II cases each year.

In addition to the new thresholds, the merger notification form was updated and is already in use. According to the FCCA, the previous form did not meet current needs. The new form requires full and detailed information on the affected markets if the parties are in a horizontal relationship and have a market share over 20 per cent or if the parties are in a vertical relationship and have a market share over 30 per cent. If the parties do not have horizontal or vertical connections, the new notification form requires only limited information.

iii Outlook

There has been a significant change in the length of merger control review periods. In 2019 and 2020, the FCCA requested the Market Court for an extension to the deadline for Phase II investigations in two cases in each year. Moreover, in both cases in 2020, the extension was requested twice. In 2021, an extension was requested twice in one case and in 2022 an extension was requested once. This practice has previously been highly exceptional but the requests for Phase II extensions are increasingly common.

In 2020–2022, the average duration of Phase II cases was 90 working days, and the pre-notification period was usually one to two months.

VII CONCLUSIONS

In reviewing Finnish competition law during the past few years, merger control has been a particularly active segment. In 2022, the FCCA issued 38 merger decisions, and Phase II investigations were initiated three cases. The FCCA submitted one penalty payment proposal in cartel cases to the Market Court. The Market Court ordered fines in one cartel case.

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Appendix 1

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Mikko Huimala is a partner in Hannes Snellman's competition and regulatory group. He advises Finnish and international companies on all aspects of competition law, including merger control, compliance, proceedings before the competition authorities and courts, and state aid.

Mikko has advised numerous major Finnish corporations in several leading merger control cases in Finland during the past years, including litigation before the Market Court.

Prior to joining private practice in 2006, Mikko gained several years of experience of investigating cartel and other competition law infringement cases in the national competition authority and the networks of competition authorities.

Mikko has a postgraduate diploma in competition law economics from King's College London. He has co-authored an in-depth textbook on EU and Finnish competition law (2012) and published several articles on competition law. Mikko is the former president of the Finnish Competition Law Association. He is ranked in *Chambers Europe* and *Best Lawyers* for his work in the field of EU and competition law.

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