

IN-DEPTH

# Public Competition Enforcement

FINLAND



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# Public Competition Enforcement

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In-Depth: Public Competition Enforcement (formerly The Public Competition Enforcement Review) is an annual survey of the most important and relevant developments in public competition law enforcement in the most significant jurisdictions worldwide. Among other things, it examines the practical implications of recent enforcement activity regarding cartels, restrictive agreements, abuse of dominance, state aid and merger control.

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# Finland

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## Introduction

### i Prioritisation and resource allocation of enforcement authorities

In Finland, the primary public enforcement authority in competition matters is the Finnish Competition and Consumer Authority (FCCA). The FCCA's competition division consists of three enforcement units, a merger control unit, a unit for supervision of procurement and competition neutrality and a unit for international competition affairs. The FCCA cannot impose penalty payments for infringements but must make a proposal to the Market Court. The decisions of the Market Court can then be appealed to the Supreme Administrative Court (SAC), which acts as the final instance in competition cases in Finland.

The relevant Finnish competition rules can be found in the Competition Act,<sup>[2]</sup> which entered into force on 1 November 2011, replacing the former Act on Competition Restrictions.<sup>[3]</sup> Since its entry into force, the Act has been amended several times, most recently at the beginning of 2023, when the merger filing thresholds were lowered. Pursuant to Section 32 of the Competition Act, the FCCA prioritises its enforcement duties to focus on the infringements that have significant impact on the proper functioning of the markets. Section 32 provides examples of situations in which the FCCA may decide not to investigate a case.

### ii Enforcement agenda

Kirsi Leivo has been the Director General of the FCCA since September 2018 and her term of office was extended in November 2023 for an additional five years, until 2028. The Director General has stressed the significance of fighting cartels and the necessity for stricter sanctions. The Director General has also stated that the monitoring of public procurement in Finland is one of FCCA's main priorities. In this regard, the Director General finds it necessary to find out why municipalities use directly awarded contracts instead of tendering, and how widespread the phenomenon is.<sup>[4]</sup>

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.<sup>[5]</sup> This led to an amendment of the Competition Act with effect from 1 January 2023, and the new, lower merger control turnover thresholds were implemented (see further Section VII). However, the FCCA's proposed right to require notification where the turnover thresholds are not met was not included in the amendment.

In addition to the new thresholds, the notification form for mergers was updated and entered into force simultaneously with the amended legislation. One of the main objectives of the change was 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,<sup>[6]</sup> 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.<sup>[7]</sup> Consequently, since then the FCCA has opened numerous investigations into public procurement matters, with annual totals of between 47 and 101; in 2022, 47 investigations were opened. Statistics for 2023 have not been published at the time of writing.

## Year in review

In 2023, merger control in particular was in the spotlight as the new turnover thresholds entered into force in January 2023. Prior to the entry into force of the new rules, the FCCA estimated that the lowered merger control thresholds would lead to approximately an additional 30 to 40 merger notifications per year. However, contrary to what the FCCA had estimated, during the first year only 10 to 15 more merger notifications were submitted compared to previous years. It is also worth noting that, apart from one transaction that was conditionally cleared, all transactions moved to Phase II in 2023 were ultimately withdrawn by the transaction parties. In addition, the FCCA for the first time made a penalty payment proposal to the Market Court for a breach of a commitment in the *Valio/Heinon Tukku* merger case, which was conditionally cleared in 2021.

As for cartels and antitrust, both the Market Court and the SAC issued significant competition decisions in 2023. In November 2023, the Market Court issued its first-ever decision concerning joint bidding in a case that concerned public transport in the Turku region. The SAC on the other hand issued in December 2023 a decision in which it found that Isojoen Konehalli Oy, a company operating in the field of technical trade, had engaged in prohibited resale price maintenance. The FCCA publicly informed of only one dawn raid, which relates to investigations into possible anticompetitive practices in procurement and wholesale in the market for wild berries. The FCCA has not provided any further information on the investigation at the time of writing.

Furthermore, Finland's new government was inaugurated in June 2023. The new government's programme includes several entries relating to competition law enforcement. For instance, an entry relating to setting a service promise for the FCCA to limit the duration of merger control processes to a reasonable time period is included. In addition, the possibility for the FCCA to give preliminary rulings will be explored. In addition, the competition neutrality control of the FCCA and its ability to control anticompetitive behaviour in the public sector will be strengthened. The government programme also includes an entry to strengthen cartel enforcement and to clarify the relevance and effectiveness of individual sanctions for cartels.

## Cartels

The FCCA made no penalty payment proposals to the Market Court in 2023. For comparison, in the past 10 years the FCCA brought one cartel case before the Market Court in 2022, 2019, 2018, 2016, 2015 and 2014, two cases in 2021 and no cases in 2023, 2020, 2017 and 2013.

In early 2023, the FCCA published a policy brief announcing that it will start using statistical methods in the detection of cartels. Statistical methods will initially be used to detect cartels in public procurement procedures. In the future, these methods may also be used to detect other types of cartels.<sup>[8]</sup>

Finland implemented a leniency programme in 2004, which can be found in Sections 14 to 17 of the Competition Act. In 2022, the FCCA issued revised leniency guidelines<sup>[9]</sup> that take account of amendments to the national leniency regime, based on the ECN+ Directive. Although the leniency procedure has not been used to a significant extent in Finland, there are some cases where a leniency application has led to the non-imposition or a reduction of a fine.

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## **i Significant cases**

### **Market Court imposes penalty payment for 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 and proposed 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.

On 22 November 2023, the Market Court gave its decision and found that the companies had submitted joint bids in breach of the Competition Act in the three public tenders.

The Market Court considered that the tenders constituted prohibited cooperation between competitors and included price-fixing and market sharing. Fines amounting to €1.54 million were imposed on five companies. The Market Court did not impose a penalty payment on one company, as the company had no turnover for the financial year preceding the Market Court's decision. At the time of writing, it is unclear whether the Market Court's decision has been appealed to the SAC.

### **Alleged cartel in the heating, ventilation and air conditioning infrastructure market**

On 9 September 2022, the FCCA proposed that the Market Court impose penalty payments of €44 million in total on six heating, ventilation and air conditioning (HVAC) infrastructure wholesalers for their alleged prohibited cooperation in the Finnish market for plastic HVAC infrastructure pipeline products from 2009 to 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 to 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 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's 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 nationwide collaboration concerning 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.

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

As discussed above, cartel detection and enforcement continue to be two of the FCCA's main priorities and the Authority actively utilises new methods in its work. In particular,

the limited competition in public procurement has been a recent concern. The FCCA has previously stated that it will bring all detected cartel infringements before the Market Court.<sup>[10]</sup> Similarly to EU competition rules, in Finland, the fines for infringements are also limited to 10 per cent of the turnover of the company, including the entire group.<sup>[11]</sup> In the new government programme, also the timeliness and effectiveness of individual sanctions was presented as a topic for further assessment.

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 largest Finnish cartel case to date, the *Asphalt* cartel, damages claims and the question of economic succession in determining the liability for damages were assessed in all civil legal instances in Finland as well as in the European Court of Justice (ECJ).

The Finnish Supreme Court made a reference for a preliminary ruling to the ECJ in December 2017 namely concerning the question of determining the parties' liability for damages in the case of economic succession. In its preliminary ruling in March 2019, the 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.<sup>[12]</sup> 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.<sup>[13]</sup> The case was dropped by the Court of Appeal in March 2020 after the parties reached a settlement in the case and withdrew their 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.<sup>[14]</sup> 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 is likely that the FCCA will continue focusing on the most harmful forms of infringements, such as hardcore cartels. As set out in the prioritising rule of Section 32 of the Competition Act, the FCCA is not obliged to investigate infringements that are deemed unlikely at the outset and have no major impact on the conditions of sound and effective competition. It remains to be seen to what extent the FCCA will utilise, for example, the new statistical methods in its cartel enforcement work.

## Antitrust: restrictive agreements and dominance

The rules on prohibited restraints on competition and on the abuse of a dominant position can be found in Sections 5 and 7 of the Competition Act. The rules 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 the context of dominance cases and the level of fines in these cases has been rather modest. Investigations in dominance cases have generally been long-lasting, and they have often ended with the FCCA closing the case without further measures.

Perhaps the most significant fine proposed by the FCCA to the Market Court in a dominance case was in 2012, when the FCCA proposed that the Market Court impose a fine of €70 million on Valio for abusing its dominant position on the market for milk. The Market Court rendered its decision in 2014, and the Market Court's decision became final when the SAC dismissed Valio's appeal in 2016. Arla lodged a damages claim of €58 million against Valio before the District Court of Helsinki, 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 District Court of Helsinki 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.

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## **i Significant cases**

### **The SAC imposes fines on Isojoen Konehalli Oy 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 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 was still ongoing in 2020 in certain respects.

In its decision rendered in August 2022, the Market Court imposed a penalty payment of €1.75 million on IKH for illegal resale price maintenance. Continuing the trend of the past few years, the penalty payment imposed by the Market Court was 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.

In December 2023, the SAC adopted a decision in the case and found that IKH had engaged in illegal resale price maintenance by setting minimum selling prices for IKH products in certain retailers' online stores and by agreeing with its authorised retailers on fixed resale prices for IKH's online stores. Contrary to the Market Court, the SAC considered that it had not been shown that the fixed resale prices had been agreed with all retailers selling IKH products in their online stores. However, the SAC did not reduce the fine imposed on IKH because it considered that the infringement was long-lasting, serious and reprehensible in nature and had a concrete negative impact on the level of prices on the retail market. Moreover, the fine of €1.75 million was relatively low in relation to the company's total turnover.

### **Alleged horizontal cooperation when complying with Forest Stewardship Council certification rules**

In 2020, the FCCA was requested to investigate in two separate cases whether forest companies had engaged in horizontal cooperation in violation of the Competition Act

when complying with Forest Stewardship Council certification rules. At the time, the FCCA decided not to continue investigations. The decisions were appealed to the Market Court, overturned, and returned to the FCCA. According to the Market Court, the FCCA's decisions 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 decisions given out in 2022 and 2023, 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 Sections 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.

### **Abuse of dominance**

In 2023, one investigation concerning an alleged abuse of a dominant position was made public by the FCCA. Fertilog Trans Oy alleged that the state-owned railway operator, VR-Yhtymä Oyj, had abused its dominant position by unilaterally terminating the parties' supply and logistics contract for freight transport by rail between Finland and Russia. The contract was terminated by VR with reference to *force majeure*. The FCCA considered that the case rather concerned a contract dispute than a competition infringement and decided not to further examine the case.

In 2022, the FCCA investigated an alleged abuse of a dominant position in the software services market. With reference to the prioritising rule of Section 32 of the Competition Act (see Section I.i), the FCCA decided not to investigate, since the matter was found to be more a dispute than a competition law matter.

### **ii Outlook**

As evident from the case examples above, the FCCA has decided not to investigate further any of the publicly announced dominance cases in recent years, mainly by referring to the prioritisation provision set out in Section 32 of the Competition Act. The trend of closing dominance investigations without further measures had been prevailing even before the actual prioritisation provision was implemented into the Competition Act.<sup>[15]</sup> The FCCA has considered in many of the dominance cases that they are rather disputes than actual competition infringements.

## **Sectoral competition: market investigations and regulated industries**

Chapter 4a of the Competition Act deals with ensuring competitive neutrality between the public and private sector. Chapter 4a gives the FCCA the power to intervene in the economic activities of a municipality, a joint municipal authority, a wellbeing services county, a wellbeing services consortium, the central government, or an entity within its control if the activities of such a public sector entity distort or are likely to distort the

conditions for competition or prevent or are likely to prevent the emergence or development of competition. The FCCA published guidelines on market-based pricing in 2017 to help public sector entities assess the competition neutrality of their own activities. The FCCA updated the guidelines in 2022<sup>[16]</sup> by clarifying the definition of profit requirements and taking into account recent changes in competition law relating to separation of accounts. The updated guidelines provide more detailed guidance on the methods of supervision used by the FCCA, in particular for assessing a reasonable return on capital employed in competitive activities.

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## **i Significant cases**

The FCCA investigated two cases concerning competition neutrality in 2023. The first case concerned alleged conduct that infringed competitive neutrality in the preparation and marketing of a group construction project. The FCCA decided not to investigate the case further since, according to the assessment of the FCCA, the operation was unlikely to have significant negative effects on the competitive conditions in the group construction consultancy sector.

The second case concerned alleged distortions of competition in the market for services in the field of round-the-clock child welfare services. In its decision, the FCCA found that the database combining the information of child welfare foster care units and offering did not constitute an economic activity to which the competition neutrality provisions of the Competition Act would apply, and therefore the case was closed.

## **ii Outlook**

The FCCA focuses on improving the identification and monitoring of sectors where competition is weak as well as on tackling measures that maintain and enhance passive competition and anticompetitive coordination in these sectors. In August 2017, the FCCA carried out inspections at the premises of a number of companies providing social and healthcare services. The FCCA is investigating whether the companies have engaged in anticompetitive practices when participating in tenders for municipalities and joint municipal authorities in the social and healthcare services market. According to public sources, the investigation is still ongoing.

In recent years, the FCCA has also taken an interest in the taxi market and has conducted studies and investigations. According to the FCCA's investigations in 2022, the taxi reform-<sup>[17]</sup> done in 2018 in Finland has increased average taxi fares. Although taxi fares have increased on average, there are also cheaper rides available and, especially in large municipalities, it is often possible to get a cheaper taxi ride than before the taxi reform.

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 in the online environment. In 2023, the FCCA published a research report in which it concludes that taxation is not sufficient to compensate for the lack of competition in the pharmacy market.

In June 2022, the FCCA published a report on its investigation into the scope and focus of the market-based economic activities of Finnish municipalities and joint municipal authorities and their controlled entities in different sectors. The FCCA examined the extent to which the municipal sector has adopted legislation on incorporation and separation of accounts. The FCCA's investigation revealed that some of the operators in the municipal sector are not familiar with the competition neutrality rules and that they have difficulties in defining and identifying market-based economic activities. In particular, weaknesses were found in the application of the separation of accounts provision. The report shows that the total turnover of the municipalities' market-based economic activities was around €8 billion in 2020.

In 2023, the FCCA investigated possibilities to increase competition in the rail freight traffic market. Furthermore, the government programme also includes entries aiming to increase competition in certain markets and to open up a number of markets to competition, including gambling and rail transport markets.

## State aid

The applicable state aid rules in Finland are Articles 107 to 109 of the TFEU and no national corresponding provisions exist. There are, however, several procedural rules concerning, for example, the recovery of unlawful state aid, the European Commission's inspection powers as well as the duty to notify state aid and exemptions thereof. The Act on the Openness and Obligation to Provide Information on Economic Activities Concerning Certain Undertakings concerns the European Commission's abilities to monitor state aid and competition rules in Finland. The aforementioned Act applies to public and private companies that carry out services of general economic interest.<sup>[18]</sup>

It is worth noting that the responsible authority in state aid matters is the Ministry of Economic Affairs and Employment that also acts as the contact point for the Commission. Thus, the FCCA does not have any role in state aid matters.

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## **i Significant cases**

### **State aid during Russia's invasion of Ukraine**

Following Russia's invasion of Ukraine, the European Commission adopted a temporary crisis framework to enable Member States to support the economy.<sup>[19]</sup> The Commission has, since 2022, approved multiple Finnish state aid measures based on this framework.

In 2023, the European Commission approved three different state aid measures granted by Finland. In March 2023, the Commission approved temporary aid for agriculture and aquaculture for increased electricity and fertiliser costs under the temporary crisis framework. The estimated budget for the measure was €95 million. Similarly, in March, the Commission also approved an aid scheme consisting of two measures. One of the measures is limited amounts of aid in the form of direct grants to eligible beneficiaries, channelled through electricity suppliers, to offset part of these beneficiaries' monthly electricity bills, with a total budget of €400 million; the other is liquidity support, in the form of guaranteed loans for electricity suppliers, to enable delayed payments of electricity bills, with a total budget of €600 million. Under the first measure, the eligible beneficiaries will be entitled to receive a maximum individual aid amount of €250,000.

Most recently, in October 2023, aid for accelerating the rollout of renewable energy and storage relevant for REPowerEU, more specifically support for the development of renewable hydrogen-derived fuels production under the 'Low-carbon hydrogen and carbon capture and utilisation' programme, was approved by the European Commission. Similarly to the cases described above, this aid measure was also approved under the temporary crisis and transition framework. The estimated budget of the measure is approximately €65 million.

### **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 before the ECJ.<sup>[20]</sup> 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 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.<sup>[21]</sup> 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.

### **Finnish Media Federation's complaint concerning Yleisradio Oy's textual journalistic online content**

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.<sup>[22]</sup> 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 discussions with the European Commission. Further, a governmental proposal submitted to Parliament in December 2020<sup>[23]</sup> 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.

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

The application of EU state aid rules is becoming an established practice, and national courts regularly deal with cases concerning the application of state aid rules. Some recent cases have concerned, inter alia, whether certain measures have constituted state aid, the interpretation of the *de minimis* criteria as well as state aid in the context of taxation measures.<sup>[24]</sup> The Foreign Subsidies Regulation<sup>[25]</sup> became fully applicable on 12 October 2023. No national corresponding rules have been implemented. The FCCA acts as the national contact point for the European Commission's enquiries.

### iii Outlook

As mentioned above, the Commission has approved several Finnish state aid measures granted under the temporary crisis framework. Some of the crisis tools of this framework were already phased out at the end of 2023, and the remaining tools are set to be phased out during 2024. This will undoubtedly also have an effect on the Finnish aid measures, and it remains to be seen to what extent aid will be granted in the future without the special support schemes that have been adopted in the context of covid-19 and Russia's invasion of Ukraine.

As regards case law, the case concerning alleged illegal state aid to Finnish bus transport company Helsingin Bussiliikenne Oy is still pending before the ECJ. Furthermore, an interesting Finnish case regarding alleged state aid granted to the Finnish broadcasting company Yleisradio Oy for the provision of video on-demand and online learning services is pending before the Commission. According to the complainant, Sanoma Media Finland Oy, these services do not comply with EU state aid rules.

## 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. As previously stated, the most recent amendment to the merger control provisions entered into force 1 January 2023 when the new turnover thresholds became applicable. Under the merger control provisions, a concentration shall be notified to the FCCA if the aggregate turnover of the parties to the acquisition exceeds €100 million in Finland and the turnover of at least two parties to the transaction exceeds €10 million each in Finland. The rules for calculating turnover correspond to a large extent to the provisions of the EU Merger Regulation.

Once a concentration has been notified to the FCCA, the authority 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 make a request to the Market Court to prohibit the concentration. If a prohibition is requested, the Market Court must decide within three months whether to clear the concentration with or without conditions, or to prohibit it.

The majority of notified concentrations are cleared in Phase I. In 2023, the FCCA cleared 46 mergers in Phase I. Phase II investigations were initiated in four cases, of which one merger was approved conditionally by the FCCA. In two Phase II cases, the parties to the transaction withdrew their filings during the FCCA's investigations, and one Phase II investigation was still ongoing at the end of 2023.

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## **i Significant cases**

### **Conditional approval for acquisition of Caverion Oyj by Triton**

On 17 October 2023, the FCCA conditionally approved private equity company Triton's acquisition of Caverion Oyj. Triton's portfolio companies include, inter alia, Assemblin Oy (Fidelix Oy) and Habeo Group Oy, which provide building technology services in Finland. Caverion is a limited liability company listed on Nasdaq that offers a wide range of building technology services and industrial maintenance. The acquisition was investigated also by the European Commission, which unconditionally approved the acquisition on 31 August 2023.

The FCCA opened an in-depth investigation into the acquisition on 24 July 2023. Based on the FCCA's initial investigations, the acquisition could have had adverse competition effects in the building automation projects and maintenance markets in Finland. The combined market shares of the parties to the merger would have become particularly high in building automation projects and maintenance services in North Karelia. In its final decision, the FCCA stated that following the acquisition, the market share of the merged entity would have been high and only one significant competitor would have remained on the market for building automation projects and maintenance services in North Karelia.

Triton made a commitment to sell the entire business activities of its portfolio company Fidelix's unit in the city of Joensuu, located in North Karelia, to a third party. The conditions imposed by the FCCA included an upfront buyer requirement. At the end of October 2023, Triton announced that it had made a binding contract with ARE Oy, and that ARE would acquire Fidelix's building automation business in North Karelia. The FCCA confirmed that ARE fulfilled the criteria for a purchaser as set out in the FCCA's conditional decision and therefore the acquisition could be fully implemented.

### **Three cases where the parties withdrew their filings in 2022 and 2023**

There were no proposals for a prohibition in 2022 or 2023. However, there have been three cases where the FCCA has opened an in-depth investigation, and during the in-depth investigation the parties have withdrawn their filings from the FCCA.

The first case concerned a proposed merger in which an energy company, Helen Oy, and a company specialising in heat pumps, LämpöYkkönen Oy, planned to establish a joint venture through which the companies would offer geothermal and heat pump solutions in Finland. The proposed transaction was notified to the FCCA in July 2022 and the FCCA opened an in-depth investigation in August 2022. The FCCA also requested an extension of the Phase II deadline, which the Market Court granted until 26 January 2023. According to the FCCA, the proposed merger could have had adverse competition effects on the heat pump market as Helen has a monopoly position in the production and sale of district heating in the area of its district heating network. Other market operators were concerned that Helen could hinder the operation of other heat pump companies, as installing heat pump systems alongside district heating requires Helen's approval and cooperation with Helen. The parties announced to the FCCA on 1 December 2022 that they had withdrawn the notified transaction. The parties decided to restructure the transaction in a way that it remained below the turnover thresholds under the Competition Act, and therefore did not have to be notified to the FCCA.

The second case concerned the proposed acquisition of Voimatel Oy by Enersense International Oyj, both active in the market for telecommunication infrastructure services. The proposed acquisition was notified to the FCCA in December 2022 and the FCCA opened an in-depth investigation in January 2023. According to the FCCA, the acquisition could have led to adverse effects on competition in the market for telecommunication infrastructure services, especially for the construction and maintenance of fixed and mobile networks. The market is already highly concentrated, and after the proposed acquisition, there would have been only two players offering a broad range of services nationwide. In addition, the tender analysis indicated that Enersense and Voimatel are close competitors. On 15 February 2023, Enersense announced that it would withdraw the notified transaction.

Most recently, the notification was withdrawn in the acquisition of Pamark Business Oy by OptiGroup FSF AB. OptiGroup and Pamark are consumer goods wholesalers operating in Finland, and they sell products such as cleaning, hygiene, health and safety products and personal protective equipment. The acquisition was notified to the FCCA in March 2023 and the FCCA opened an in-depth investigation in April 2023. The FCCA also requested an extension for the Phase II deadline, which the Market Court granted until 15 September 2023. According to the FCCA, the acquisition would have led to adverse effects on competition in the market for cleaning and hygiene products especially to larger customers in Finland. As it seemed unlikely that the transaction would have been approved, the parties decided to withdraw their filing in August 2023.

### **First proposal for a penalty payment in a merger case by the FCCA**

In December 2023, the FCCA made a proposal to the Market Court to impose a fine of €900,000 on Valio Oy. The FCCA conditionally approved the acquisition of Heinon Tukku, a foodservice wholesaler, by Valio, a dairy and food company, in 2021. The transaction could not be approved as such because Valio would have received information on the

pricing of competing food manufacturers through Heinon Tukku, which would have affected Valio's incentives in its own pricing. To address the competition concerns, Valio committed to protect the confidential information of its competitors in a way that it would not be passed on to the persons in the organisation responsible for pricing Valio's products. Data protection was implemented through system limitations, and an independent expert was appointed to oversee compliance. At the end of 2022, Valio informed the FCCA that it had detected an error in the protection of competitors' price information and that persons who are responsible for pricing Valio's products in the organisation had had access to competitors' price information for several months. According to the FCCA, Valio had failed to comply with the key condition for the approval of the transaction: its commitment to protect the price information of competing manufacturers. The case is currently pending before the Market Court.

## ii Trends, developments and strategies

The new turnover thresholds entered into force on 1 January 2023. By lowering the thresholds and changing the requirement of worldwide turnover to national turnover, the FCCA estimated that the number of notifications would almost double compared to the average amount of notifications from 2017 to 2022.<sup>[26]</sup> However, in 2023, the estimated increase in the number of notifications did not fully materialise, with only 16 more notifications than the average for the period from 2017 to 2022. The number of notified transactions to the FCCA in 2023 was 49, while the average number of the merger notifications from 2017 to 2022 was 33.

In addition to the new thresholds, the merger notification form<sup>[27]</sup> was updated. 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. The FCCA has also published new guidance and updated its old guidelines on merger control in 2022. The new guidelines replaced the previous guidelines on merger control from 2011. Some of the published guidelines are republications of old guidelines, with only the name of the agency and obsolete legal references updated. New guidelines concern the processing of transactions by the FCCA and the information requirements of the notification form.

In connection with the reform of the thresholds, the FCCA also proposed a right to require a notification even when the turnover thresholds are not met. This was not included in the final amendments.

In August 2023, the FCCA made its first referral request to the Commission under Article 22 of the EUMR<sup>[28]</sup> that allows Member States to request the Commission to examine certain acquisitions, even if they do not meet EU merger control thresholds. The referral request was made together with the Danish competition authority, and later the Swedish and Norwegian competition authorities also joined the referral request. The subject of the referral request is a transaction in which European Energy Exchange AG (EEX) intends to acquire the European power trading and clearing business of Nasdaq. The transaction met neither national nor EU turnover thresholds, but the Commission took the preliminary view that the merger review criteria are met. The Commission has requested EEX to notify the transaction, but at the time of writing the case is not yet pending before the

Commission. In August 2023, the FCCA also joined 15 other EU competition authorities in their request for referral regarding Qualcomm's proposed acquisition of Autotalks, a transaction that falls below EU and national merger notification thresholds. The parties to the proposed transaction are leading suppliers of vehicles-to-everything semiconductors. The Commission has requested Qualcomm to notify the transaction but, at the time of writing, the case is not yet pending before the Commission.

### iii Outlook

The average length of review periods of Phase I cases has been declining since 2020 and was approximately 13 working days in 2022. As for Phase II cases, 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 each year. Moreover, in both of the cases in 2020, the extension was requested twice. Similarly, in 2021 an extension was requested twice in one case and in 2022 and 2023, the FCCA requested an extension once in one case each year. Such requests for extensions have previously been highly exceptional but seem to be becoming rather common.

From 2020 to 2023, the average duration of Phase II cases was approximately 90 working days, and the pre-notification period was usually one to two months.

## Outlook and conclusions

In reviewing Finnish competition law during the past few years, merger control has been a particularly active segment. In 2023, the FCCA issued 48 merger decisions, and Phase II investigations were initiated in four cases. The FCCA did not submit any penalty payment proposals in cases concerning cartels, dominance or restrictive agreements to the Market Court in 2023. The Market Court ordered fines in one cartel case in 2023 and the SAC issued one decision concerning resale price maintenance.

### Endnotes

- 1 Mikko Huimala is a partner and Annika Grönholm is an associate at Hannes Snellman Attorneys Ltd. [^ Back to section](#)
- 2 948/2011. [^ Back to section](#)
- 3 480/1992 (annulled). [^ Back to section](#)
- 4 Hartikainen, Jarno: Helsingin Sanomat 10 December 2022. [^ Back to section](#)
- 5 The FCCA study on the potential need for legislative change regarding the national merger filing obligation. [^ Back to section](#)

- 6 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. [^ Back to section](#)
- 7 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. [^ Back to section](#)
- 8 FCCA Policy Brief 1/2023. [^ Back to section](#)
- 9 Guidelines on immunity from and reduction of penalty payments in cartel cases: Guidelines on the application of the Competition Act (2022). [^ Back to section](#)
- 10 FCCA press release, 20 February 2012. [^ Back to section](#)
- 11 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. [^ Back to section](#)
- 12 Case C-724/17. [^ Back to section](#)
- 13 2019:90. [^ Back to section](#)
- 14 Case C-450/19. [^ Back to section](#)
- 15 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. [^ Back to section](#)
- 16 *The FCCA's Guidelines on Market Based Pricing, Updated 11/2022*. [^ Back to section](#)
- 17 *With the law reform, the regulation of taxi fares and volumes was abolished*. [^ Back to section](#)
- 18 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). [^ Back to section](#)
- 19 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). [^ Back to section](#)
- 20 Case C-697/22 P. [^ Back to section](#)

- 21** Case T-603/19. [^ Back to section](#)
  
- 22** 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). [^ Back to section](#)
  
- 23** Government Bill 250/2020. [^ Back to section](#)
  
- 24** See, for instance, judgments of the Supreme Administrative Court of 7 July 2021, Record No. 393, 10 May 2021, Record No. 337, 7 July 2021, Record No. 393, 20 January 2021, Record No. 28. [^ Back to section](#)
  
- 25** Regulation (EU) 2022/2560. [^ Back to section](#)
  
- 26** FCCA blog post dated 14 April 2023. [^ Back to section](#)
  
- 27** *The notification form is based on the amendment (920/2022) to the Government Decree on the Obligation to Notify Transactions (1012/2011).* [^ Back to section](#)
  
- 28** EU Merger Regulation (Regulation (EU) No. 139/2004). [^ Back to section](#)

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