THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Thirteenth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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THIRTEENTH EDITION

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CONTENTS

PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. Of particular note this year, many chapters discuss the covid-19 pandemic and related competition matters, including price-gouging investigations and policy statements on collaborations to fight the pandemic. Relatedly, several jurisdictions paid particular attention to sectors such as healthcare, online commerce and retail food. Despite the pandemic, competition enforcement in many jurisdictions continued in line with past practice, while a few jurisdictions saw record fines or activity in certain areas. Meanwhile our contributors from Mexico describe a 'challenging political environment' related to competition enforcement.

Several agencies, including those in Argentina, Japan, Poland and the United States had a change in leadership. Perhaps the most significant change comes from the United Kingdom. That chapter provides an informative overview of the UK competition law regime post-Brexit and discusses the competencies and priorities of the Competition and Markets Authority (CMA) as the United Kingdom emerges from the transition period under the European Union Withdrawal Agreement. Our authors note an active agenda for the CMA. Now, for example, 'global mergers can expect to face parallel reviews on both sides of the English Channel.'

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors and several overlapping investigations. Of particular note, both the UK and US chapters discuss the *Sabre/Farelogix* transaction, which was allowed by a court in the United States but blocked by the CMA. We also learn that in 2020, the French Competition Authority blocked a merger for the first time ever. Our authors note that the merger 'would have created a duopoly between the hypermarket retailers Carrefour and E Leclerc in the conurbation of Troyes city'. Our contributors from Poland note that authorities there issued a record number of merger decisions, and the chapter from Indonesia notes an increase in merger filings there 'partly due to the expansion of the scope of mergers and transactions that must be notified' to the Indonesia Competition Commission. Enforcers in several jurisdictions issued merger enforcement guidance. The UK published draft merger assessment guidelines, French authorities published new merger control guidelines and the US federal enforcement agencies published vertical merger guidelines.

The policing of cartels remains a focus of competition agencies around the globe. Japan issued fines for bid rigging in the construction industry. The Canadian Competition Bureau concluded investigations into municipal contract bid-rigging. Greek authorities also conducted several bid-rigging investigations, including in construction and security services. A price-fixing investigation in the banking sector in Greece 'triggered the biggest dawn-raid ever witnessed' to date. Cartel fines in Taiwan 'soared in 2020,' our authors note, as a result

of fines issued in connection with the hard disk drive suspension products cartel matter there. Portuguese authorities also levied their largest fines ever. These were in cases involving telecommunications services and in the retail food sector.

Digital platforms have continued to attract scrutiny and regulatory action worldwide. Several agencies established groups specifically focused on this area. For example, Japan enacted a Digital Platform Transaction Transparency Act and established an Office of Policy Planning and Research for Digital Markets. French authorities have created a dedicated Digital Economy Unit and are investigating the digital sector. Greek authorities launched a sectoral inquiry into e-commerce and fintech. Several jurisdictions are also investigating digital platforms. Italy is pursuing investigations into Amazon, Apple and Google; Canada is investigating Amazon; France implemented interim measures against Google. And of course the enforcement authorities in the United States filed antitrust cases against Google and Facebook. Turkish authorities are also investigating platforms and are working on a Digitalization and Competition Policy Report. The Mexican COFECE published a Digital Market Strategy and 'created a special Digital Market Division'.

In addition to digital platforms, pharmaceutical companies are also seeing attention from competition enforcement authorities around the globe. For example, UK and Japanese authorities took actions against bid rigging in this sector. Turkey conducted an investigation into alleged collusion for eye treatment drugs. The French Competition Authority also imposed fines in this area. The Italian Council of State upheld a fine imposed by competition authorities there against a pharmaceutical company for 'excessive prices' for certain drugs. Canada concluded an inquiry into conduct involving the ability of generic pharmaceutical manufacturers to access samples of branded drugs for regulatory purposes. The United States also took notable action against pharmaceutical companies.

Another area of similarity is enforcement against resale price maintenance (RPM). Several jurisdictions took actions against such practices. We read that the UK has 'a renewed focus' in this area and concluded a matter involving musical instruments. Musical equipment RPM also attracted regulatory attention by Polish authorities. And resale price maintenance and other potential violations in the Greek wristwatch industry generated a statement of objections from authorities there. Finnish authorities recommended a penalty for a hardware company for engaging in resale price maintenance.

In the coming year, we will watch with interest to see how enforcers around the world approach these (and perhaps other) common areas of interest.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2021

Chapter 6

FINLAND

Mikko Huimala, Lauri Putkonen and Meri Vanhanen[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] A new amendment process began in 2015, and in May 2018, a Government Bill on amendments to the Competition Act[4] was presented to Parliament. Parliament passed the Government Bill, and the amendments to the Competition Act entered into force on 17 June 2019.[5] The key amendments concerned the calculation of deadlines in merger control, inspections carried out by the FCCA, the FCCA's right to obtain information and the exchange of information between authorities. In addition to the above, the competition neutrality provisions of the Competition Act were supplemented with an accounting separation obligation concerning municipalities, joint municipal authorities, the state and any entities under their control that engage in economic activities in a competitive situation. The accounting separation obligation entered into force on 1 January 2020.

In November 2020, the Finnish government issued a government bill to further amend the Competition Act.[6] The proposed amendments mainly related to imposition of fines and structural remedies as well as strengthening the FCCA's investigation powers. The proposed amendment would, for instance, give the FCCA a possibility to impose structural remedies to end competition infringement and the authority to conduct inspections also outside the business premises if there is a probable cause to suspect that potential evidence is kept there. In addition, there is a proposal to increase the maximum fine possible for associations of undertakings so that it would be 10 per cent of the combined turnover of all members of the association that operate in the markets affected by the latter's infringement.

1 Mikko Huimala is a partner, Lauri Putkonen a senior associate and Meri Vanhanen an associate at Hannes Snellman Attorneys Ltd. The original article was written by Tapani Manninen, a former senior advisor at Hannes Snellman.

2 948/2011.

3 480/1992 (annulled).

4 Government Bill 68/2018.

5 721/2019.

6 Government Bill 210/2020.

The amendments were intended to enter into force on 4 February 2021, by which time the national implementation of the ECN+ directive should have been completed. However, the national implementation in Finland has been delayed.

ii Enforcement agenda

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

The FCCA's objectives for the years 2020–2023 include continuing to focus on the detection of hardcore cartels. The FCCA will also emphasise effective merger control with the intention of preventing the emergence of harmful concentrations in advance. Furthermore, the FCCA will continue to implement its supervisory powers concerning public sector entities with regard to competitive neutrality issues. In addition, the FCCA will continue the supervision of the legality of public procurement, which was assigned to it as of the beginning of 2017.[7] Consequently, the FCCA opened an investigation in 86 public procurement matters in 2017, in 101 matters in 2018 and in 57 matters in 2019. Statistics for 2020 have not been published as 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 2016, the revised leniency guidelines issued in 2011[8] were replaced with new guidelines[9] that take account of the new Antitrust Damages Act.

The FCCA received its first leniency case only minutes after the entry into force of the programme in 2004.[10] However, after a spectacular start, there have been only a few leniency applications, which has clearly been a disappointment to the FCCA.[11] 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.

i Significant cases

The Market Court ordered fines to a regional driving school association and two driving schools

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.

8 Immunity from and reduction of fines in cartel cases: Guidelines on the application of the Competition Act, 2/2011.

9 Guidelines on immunity from and reduction of penalty payments in cartel cases: Guidelines on the application of the Competition Act (2016).

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

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

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 giving anticompetitive 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 a total of €20,000 (€6,000 for the Association, €12,000 for Porvoon Autokoulu and €2,000 for Eko-Center) and were significantly lower than initially proposed by the FCCA. With regard to the four other driving schools on the Association's board, the Market Court dismissed the FCCA's proposal. In addition, the Market Court dismissed the FCCA's proposal regarding three driving schools' alleged infringement of competition rules by agreeing on price increases. The case is not final since the FCCA and the Association have appealed the decision to the SAC.

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.[12] Corresponding to EU rules, the fines may equal 10 per cent of the undertaking's turnover at the most.[13] The FCCA's new Director General has publicly emphasised the need for a higher level of fines than what 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 to adopt similar guidelines as the Commission has adopted on the manner of setting fines.[14]

In reviewing Finnish competition law during the past few years, it is clear that private enforcement has been a particularly active segment. 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 leaves to appeal to one respondent and one claimant in September 2017. Some applications for leave to appeal were

12 FCCA press release, 20 February 2012.

13 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.

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

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 for a preliminary ruling to the European Court of Justice regarding the question of economic succession in determining the parties liable for damages. In its preliminary ruling on March 2019, the ECJ ruled that Article 101 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.[15] In October 2019, the Supreme Court applied the principle of economic continuity accordingly as set forth 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 judgement and referred the case back to the Court of Appeal for evaluation of other prerequisites for liability and the amount of damages.[16] 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 for a preliminary ruling to the ECJ 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) TFEU is regarded as having ended. The FCCA had argued that the cartel should be considered to have lasted until the last instalment of contract price was paid. In January 2021, the ECJ held, contrary to the FCCA's view, that the duration of one of the defendant's participation in the alleged infringement covers the entire period during which that undertaking implemented the anticompetitive agreement entered into with its competitors, including the period during which the fixed-price offer which that undertaking submitted 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 is 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' have finally been laid down.[17] The case is currently pending before the SAC.

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.

15 Case C-724/17.

16 2019:90.

17 Case C-450/19.

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 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. Typical Section 7 investigations of the FCCA have lasted a long time and have ended with the FCCA closing the case without further measures. The experiences have been equally frustrating to 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 2020, the FCCA gave 14 decisions regarding suspected restrains on competition without finding an infringement of competition. In six of these 14 cases, there was a question of alleged abuse of dominant position. The FCCA decided not to investigate four of these cases at all by referring to the prioritising rule of Section 32 of the Competition Act. In two of these cases the FCCA conducted investigations but did not find evidence of abuse of a dominant position. Two of the decisions concerned anticompetitive cooperation between competitors in the wood sector; however, the FCCA concluded that it does not appear likely that there exists an infringement of the Finnish Competition Act or the EU Competition Rules, and consequently, did not investigate the matters further. The remaining six cases concerned publicly funded transport services. The FCCA concluded that considering that the companies changed their behaviour during the investigation, and the changes in the regulatory environment in the taxi industry in Finland, there was no reason to continue investigations.

i Significant cases

Restraints on competition

FCCA proposed a penalty payment for IKH for resale price maintenance

On 20 May 2020 the FCCA proposed the Market Court to 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 pressured its 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. The case is currently pending before the Market Court.

Abuse of dominance

In 2020, the FCCA closed two investigations regarding suspected abuse of dominance in the Finnish postal sector. The first case concerned the FCCA's investigation of whether Posti had abused a dominant position by implementing a pricing reform with regard to corporate letters. The competitors of Posti's subsidiary Posti Messaging alleged, among other things, that by these pricing reforms Posti was favouring its subsidiary in order to foreclose these rivals. In the second case, the FCCA investigated Posti's behaviour in its unaddressed delivery business, specifically, whether Posti's pricing was predatory. In both cases, the FCCA concluded that there was no evidence of anticompetitive behaviour and closed the investigations.

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.[18] Section 32 codifies the practice and grants the FCCA a right to remove cases that have only a minor impact on the economy more quickly.

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. This has had a positive effect on the processing times as well, as these have tended to be long. The FCCA has internally set a target that no case would be under investigation for longer than three years.[19]

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Chapter 4a of the Competition Act entrusts the FCCA with a supervisory task to enhance competitive neutrality between public and private businesses. Pursuant to the Chapter, the FCCA has the power to intervene in the business activities of the municipalities, the joint municipal authorities and the state, as well as the entities over which they have control if the 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 to assess the competitive neutrality of their own activities.[20] The guidelines describe the principles and measures of the FCCA in the supervision of pricing. According to the guidelines, the supervision consists of assessing both the setting of prices and the economic activity of the public sector entities.

So far, the FCCA has published 15 decisions concerning competitive neutrality, two of which were published in 2020.

18 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.

19 FCCA strategy paper for 2015–2018, p. 3.

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

i Significant cases

In May 2020, the FCCA rendered a decision concerning the Finnish Heritage Agency, an agency operating under the Ministry of Education and Culture and responsible for protecting environments with cultural history value and other cultural property. The FCCA had investigated the business activities of the agency on the archaeological research market. Although many of the agency's duties are based on the Antiquities Act, it also pursues commercial activities. According to the FCCA, pricing applied by the agency could have been distorted because the costs of statutory duties and economic activities carried out on the market had not been sufficiently separated from each other. In addition, the requirement for a reasonable rate of return had not been properly taken into account in certain bid calculations. The FCCA closed its investigation after the agency undertook to implement several measures to improve its compliance with the requirement of market-based pricing, including improving the calculation of costs. The agency also undertook to better consider the requirements set for reasonable returns in the pricing of archaeological studies.

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 said companies had impeded competition when they participated in tender processes. Based on public sources, investigation is still ongoing. In addition, in March 2017, the FCCA announced investigations regarding possible anticompetitive measures in the property management market. After a long investigation, the FCCA announced in February 2021 that it would propose a penalty payment of €22 million to six property management companies and the Finnish Real Estate Management Federation for price-fixing. In recent years, the FCCA has also shown interest in the taxi market and has conducted related 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 lowering their own margins.

V STATE AID

There are no national rules on state aid, and the applicable rules are those laid down in Articles 107 to 109 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 to Finnair Oyj

Following the coronavirus outbreak, several Finnish support measures to help companies during the pandemic were approved in 2020 under the European Commission's State Aid Temporary Framework.[22] One of the notable measures was Finland's contribution to the recapitalisation of the state-controlled airline Finnair through the subscription of new shares by the state in the rights issue launched by Finnair in June 2020 in the context of the outbreak. The rights offering is one of the largest rights offerings in Finland in recent years. The European Commission approved Finland's plans, according to which the state was expected to receive rights to subscribe for new shares in an amount of approximately €286 million, corresponding to its current shareholding level. Eventually, the decision in the case lead to some amendments to the State Aid Temporary Framework. Prior to participating in the share issue, Finland had also granted a 90 per cent guarantee on Finnair's earnings-related pension loan, which was also approved by the European Commission under the State Aid Temporary Framework.

Illegal state aid awarded to Helsingin Bussiliikenne Oy

In June 2019, the European Commission concluded its investigations concerning alleged illegal state aid to Finnish bus transport company Helsingin Bussiliikenne Oy (HelB) 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 investigation confirmed that private market creditors would not have granted the loans under the same terms and conditions (for instance, very low interest rates), notably considering the financial difficulties HelB was facing at the time when 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, the assets and business operations of HelB were sold to one of its competitors. According to the Commission, as the new owner became the economic successor of HelB, it also became responsible for repaying the incompatible state aid.

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 (OJ C 91I, 20 March 2020, p. 1–9), as amended.

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 in recent years annulled several administrative court decisions partly due to the courts omitting 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.[23]

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 Communication on public service broadcasting.[24] Instead, the services in question should be evaluated under the EU services of general economic interest doctrine. The Finnish Media Federation argued that since a private supply of said 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 was submitted to the parliament in December 2020,[25] proposing 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.

VI MERGER REVIEW

The provisions on merger control were revised in the 2011 reform of the Competition Act with the purpose of bringing them further into line 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

23 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.

24 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).

25 Government Bill 250/2020.

2015, 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 to 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 make its decision either to clear the concentration with or without conditions or prohibit it within three months.

The majority of notified concentrations are cleared in Phase I. In 2020, the FCCA issued approximately 20 merger decisions, and Phase II investigations were initiated in four cases.

i Significant cases

Market Court prohibition in Kesko/Heinon Tukku

In February 2020, the Market Court prohibited the merger between Kesko Oyj and Heinon Tukku Oy. Both companies operate in the wholesale trade of daily consumer goods and provide services for foodservice customers, such as restaurants, hotels, and catering businesses. The prohibition decision is the first ever to be adopted in Finland.

The FCCA opened Phase II investigations in June 2019, the deadline for which was later extended twice by the Market Court. According to the FCCA's view, the acquisition would lead to a dominant position with a market share of up to 60–70 per cent, which would impede the effective competition. The FCCA held that the remedies submitted by Kesko were inadequate to address the competition concerns related to the acquisition and proposed the Market Court for prohibition. Kesko contested the FCCA's views. The FCCA proposed the Market Court to prohibit the merger in November 2019.

FCCA conditional approval in Donges Teräs Oy/Ruukki Building Systems Oy

In April 2020, the FCCA conditionally approved the acquisition of Ruukki Building Systems Oy by Donges Teräs Oy. Both companies operate in the provision of steel structures, their product portfolios including steel bridges and steel frame structures for commercial and industrial buildings.

The FCCA launched the Phase II investigations in January 2020 based on the view that the merger will harm competition in the market of steel frame structures for business premises and industrial buildings as well as on the market of turnkey deliveries of steel bridge structures. According to the FCCA, the market of steel structure provision is rather concentrated in Finland, and the combined market share of the parties is remarkably high especially in the market of steel bridge structures. Eventually, Donges Teräs undertook to

sell the business of one of Donges Group's manufacturing plants to a party that has the prerequisites for maintaining and developing the business, and the FCCA considered that as an adequate commitment to eliminate the competition concerns.

FCCA proposal for prohibition in Mehiläinen Oy/Pihlajalinna Oyj

The FCCA proposed the Market Court to prohibit the acquisition of Pihlajalinna Oyj by Mehiläinen in September 2020 after exceptionally lengthy investigations. The transaction was transferred from the European Commission to the FCCA in February 2020, and the Market Court extended the deadline for the decision twice following FCCA's requests. Both parties provide private healthcare services, and they compete in several segments of the healthcare market.

In its proposal, the FCCA stated that the Finnish healthcare market has concentrated rapidly over the last decade. According to the FCCA's investigations, if approved, the merger would further concentrate the health services market by reducing the number of large national players from three to two. The FCCA identified competition concerns in several healthcare segments, leading to significant price increases and poorer choice for customers. The FCCA did not consider the remedy proposals submitted by Mehiläinen to address the competition concerns.

Mehiläinen withdrew the tender offer in November 2020, and the Market Court declared in December 2020 that it no longer has grounds to investigate the merger as the case has ceased to be in effect.

FCCA conditional approval in Loomis AB/ Automatia Pankkiautomaatit Oy

The FCCA approved the acquisition of Automatia Pankkiautomaatit Oy by Loomis AB with conditions in October 2020. Loomis provides cash transition and cash handling services in Finland, whereas Automatia offers cash supply services for bank branches and, among other things, operates the largest ATM network in Finland. The FCCA's in-depth investigation focused on the vertical effects of the transaction. The FCCA concluded that Loomis' most relevant competitor, Avarn, would be excluded from the market if the deal would be unconditionally approved. Consequently, competition would be further weakened in the already highly concentrated markets for cash in transit and cash handling services.

To address the competition concerns, Loomis and Automatia committed to provide access to Automatia's cash infrastructure for existing and new cash management service providers for the next five years. In addition, Loomis and Automatia committed, among other things, to continue to purchase cash management services from Avarn on current terms for the next two years and for the following three years in accordance with a staggered minimum purchase obligation.

ii Trends, developments and strategies

The FCCA has itself noted that the need for reform of the Finnish merger control provisions should be investigated, including an assessment of whether the current turnover thresholds are still appropriate.[26]

26 See, for instance, FCCA newsletter 2/2019 and FCCA press release, 5 October 2018.

iii Outlook

There has been a significant change in the length of review periods in merger control. Among other things, in 2017 and 2018 the FCCA requested the Market Court to extend the deadline of Phase II investigations in four cases. Before then, the practice had been highly exceptional. In 2019 and 2020, an extension to the deadline was requested in two cases each year. Moreover, in both of the cases in 2020, the extension was requested twice.

No major developments are expected to take place in Finnish merger control in the immediate future. The FCCA anticipates that there will be problematic transactions likely to have serious effects on competition.[27]

VII CONCLUSIONS

In reviewing Finnish competition law during the past few years, private enforcement and merger control have been particularly active segments. In 2020, the FCCA issued 20 merger decisions and one proposal to the Market Court to prohibit the acquisition, which is relatively rare. In addition, the Phase II investigations were initiated in four cases. Although it was a rather busy year for mergers, the FCCA did not bring any cartel cases before the Market Court. The Market Court ordered fines in one cartel case.

27 FCCA strategy paper for 2018–2021, p. 1.

Appendix 1

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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.

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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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