THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Fourteenth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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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. In the past year, we have also seen the emergence of cooperative policy efforts among several enforcement authorities. Two areas in particular – digital markets and pharmaceutical markets – have been the focus of cross-border initiatives. The G7 – Canada, France, Germany, Italy, Japan, the United Kingdom and the United States – along with Australia, India, South Africa, South Korea and the European Commission participated in a Digital Competition Enforcers Summit, which was hosted by the UK Competition and Markets Authority (CMA) in November 2021. Earlier in the year, the United States Federal Trade Commission, certain state attorneys general, the European Commission, the Canadian Competition Bureau and the CMA established a multilateral pharmaceutical working group.

In many jurisdictions, merger review and enforcement activity remain robust. Indeed, the United States agencies are dealing with an exceptionally high number of merger filings, reflecting a marked increase in deal activity. Meanwhile, in France, the Competition Authority (FCA) also saw a significant increase in merger activity and blocked a merger in the pipeline industry. According to our authors, this is only the second time the FCA has blocked a merger. Merger reviews were also up in Brazil. At the same time, however, the report from the United Kingdom notes that expectations for an increase in merger review activity at the CMA have so far not been realised and 'there is no evidence, as yet, of the expected Brexit boom in notifications'. In Japan, the Fair Trade Commission (JFTC) 'maintained a steady level' of merger enforcement activity.

The policing of cartels continues to be a focus of several competition agencies around the globe. Many jurisdictions with active anti-cartel enforcement programmes have seen the return of dawn raids, which had been largely suspended in several countries after the onset of the covid-19 pandemic. For example, dawn raids in Japan targeted the utilities sector, which, as we read in that country's submission, appears to be an area of focus for the JFTC. In Portugal, 2021 was 'record year for dawn raids', according to our authors. Authorities there targeted the financial, energy, healthcare and information services sectors. The Swedish Competition Authority conducted a dawn raid related to alleged price-fixing for covid-19 PCR tests. Our authors from Greece note that in the second half of 2021, authorities there conducted dawn raids on companies in 'an impressive range of markets'.

Digital platforms have continued to attract scrutiny and regulatory action worldwide. In the United Kingdom, the CMA is establishing a Digital Markets Unit and has proposed legislation aimed at digital companies with 'strategic market status'. Similarly, the European Commission has proposed a Digital Markets Act to regulate that sector in the European Union; and competition authorities of Member States have been involved in the negotiation

of that legislation. Numerous legislative proposals introduced in the United States are aimed at digital platforms, and the agencies here are continuing with litigation against several platform companies. Numerous other jurisdictions are engaged in legislative and enforcement activity in this area, including Japan, where the Digital Platform Transaction Transparency Act recently came into force. Companies operating in digital markets were also the subjects of enforcement activity in several other jurisdictions, including Argentina, Canada, France and Turkey. In addition to digital platforms, pharmaceutical companies are also seeing attention from competition enforcement authorities around the globe, including in the United Kingdom, the United States and Japan.

A number of agencies have continued to bring actions against resale price maintenance (RPM). Indeed, as we read in the chapter from the United Kingdom, it is clear that RPM (particularly as it relates to online pricing restrictions) remains a top priority for the CMA. Indeed, following several fines imposed in 2020, the CMA issued a statement of objections to a lighting company. Swedish authorities also fined a lighting supplier. Elsewhere, French authorities fined eyewear manufacturers and companies involved in video surveillance, and Turkish authorities levied fines on fuel distributors. It is also notable that enforcement activity in labour markets appears to be increasing in several jurisdictions, including in the United States. The Turkish Competition Board and the Portuguese Competition Authority are also examining labour market issues.

In the coming year, we will watch with interest to see how competition regulation and enforcement continues to evolve around the globe.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2022

Chapter 6

FINLAND

Mikko Huimala, Lauri Putkonen, Meri Dahlqvist and Susanna Kyllöinen[1]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

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

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

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

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.

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

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

2 948/2011.

3 480/1992 (annulled).

4 Government Bill 210/2020.

would create notable benefits to consumers.[5] 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.[6] Consequently, since then the FCCA has opened numerous investigations into public procurement matters, with annual totals of between 57 and 101; for example, 61 investigations were opened in 2020. Statistics for 2021 have not been published at the time of writing.

II CARTELS

Finland has had a leniency programme in place since 1 May 2004. The programme was updated in the Competition Act, which entered into force in November 2011, and is now laid out in Sections 14 to 17 of the Competition Act. The leniency programme is very similar to the European Competition Network model leniency programme. In 2022, the FCCA issued revised leniency guidelines[7] that take account of amendments to the national leniency regime, based on the ECN+ Directive.[8]

The FCCA received its first leniency case only minutes after the entry into force of the programme in 2004.[9] However, after a spectacular start, there have been only a few leniency applications, which has clearly been a disappointment to the FCCA.[10] The relatively small number of leniency cases is reflected in the number of the FCCA's penalty payment proposals to the Market Court in cartel cases. In 2014, 2015, 2016, 2018 and 2019 the FCCA only brought one cartel case before the Market Court each year, while in 2013, 2017 and 2020 no cases were brought before the Market Court by the FCCA. In 2021, the FCCA submitted two penalty payment proposals to the Market Court.

i Significant cases

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

On 21 November 2019, the FCCA submitted a proposal to the Market Court to impose a fine of around €300,000 in total on Uusimaa Driving School Association (the Association) and eight driving schools. According to the FCCA, the Association and six driving schools on the Association's board encouraged driving schools to raise their prices. According to the

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

6 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.

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

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

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

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

FCCA's proposal, the infringement began in April 2014 and continued until October 2015. In addition, three driving schools allegedly infringed competition rules by agreeing on price increases from the beginning of 2013 to the autumn of 2014.

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

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

Alleged cartel in the real estate management industry

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

Alleged bid rigging in public transportation

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

the transport contracts won in the tenders. Moreover, the FCCA also considered that the parties had the capability to provide services individually. The case is currently pending before the Market Court.

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

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

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.[11] Corresponding to EU rules, the fines may equal 10 per cent of the undertaking's turnover at the most.[12] The FCCA's new Director General has publicly emphasised the need for a higher level of fines than has been imposed by the courts in practice, arguing that higher fines would have a stronger deterrent effect, and welcomed the idea of criminalising cartel conduct in Finland. According to the Director General, there is a need in Finland to adopt guidelines on the method of setting fines similar to those adopted by the Commission.[13]

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

11 FCCA press release, 20 February 2012.

12 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.

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

In December 2017, the Supreme Court made a reference to the European Court of Justice for a preliminary ruling regarding the question of economic succession in determining the parties liable for damages. In its preliminary ruling on March 2019, the European Court of Justice (ECJ) ruled that Article 101 of the Treaty on the Functioning of the European Union (TFEU) must be interpreted as meaning that where the infringing economic unit had been dissolved, a company acquiring the commercial activities of the dissolved company and continuing those activities may be held liable for the damage caused by the infringement. In addition, the ECJ stated that the concept of 'undertaking' cannot have two different dimensions when considering penalty payments and damages.[14] 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.[15] The case is still pending before the Court of Appeal. Further, significant damages cases concerning an infringement involving the procurement of raw wood came to an end in January 2019, when the Supreme Court dismissed an application for leave to appeal by one of the claimants.

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

The SAC sought to ascertain, in substance, at what point in time the alleged participation of an undertaking in an infringement of Article 101(1) of the TFEU is regarded as having ended. The FCCA had argued that the cartel should be considered to have lasted until the final instance of the contract price was paid. In January 2021, contrary to the FCCA's view, the ECJ held that the duration of the participation of one defendant in the alleged infringement covered the entire period during which that defendant undertaking implemented the anticompetitive agreement entered into with its competitors, including the period during which the fixed-price offer submitted by that undertaking was in force or could have been converted into 'a definitive works contract' between the defendant and contracting authority. Ultimately, the ECJ held that it was for the national court to determine 'the date on which the essential characteristics of the relevant contract and, in particular, the total price to be paid for the work' were finally laid down.[16] In August 2021, the SAC concluded that the date on which the essential elements were laid down occurred more than five years before the FCCA's proposal to the Market Court. This meant that the proposal had been submitted after the expiry of the five-year limitation period and was therefore time-barred.

iii Outlook

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

14 Case C-724/17.

15 2019:90.

16 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 of the TFEU.

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

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

In 2021, the FCCA issued 10 decisions regarding alleged restraints on competition, without finding an infringement of competition. In nine of these 10 cases, there was an alleged abuse of dominant position. With reference to the prioritising rule of Section 32 of the Competition Act (see Section II.iii), the FCCA decided not to investigate one of the cases at all, since it was manifestly unfounded. In one case, regarding the drugs market, the FCCA conducted investigations but did not find evidence of adverse effects on competition sufficient to justify continuation of its efforts in the case. The FCCA terminated its scrutiny in one public transportation case since the request for action was withdrawn in the course of the investigation and the authority concluded that it was unnecessary to proceed in the case. The remaining seven cases concerned publicly funded transport services. The FCCA concluded that because the companies changed their behaviour during the investigation, and there had been 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 penalty payment proposed for IKH for resale price maintenance

On 20 May 2020, the FCCA proposed that the Market Court impose a penalty of €9 million on Isojoen Konehalli Oy (IKH) for engaging in illegal resale price maintenance. IKH is an import and hardware company selling products directly to consumers and retailers. According to the FCCA's proposal, IKH had set recommended prices for the products it sells and had also pressured retailers to comply with its recommendations in different ways. In practice, this had prevented price competition between IKH's retailers and increased prices for the products sold to customers. The FCCA argued that the infringement began in 2010 and is still ongoing in certain respects. The case is currently pending before the Market Court.

Abuse of dominance

In 2021, the FCCA closed two investigations regarding suspected abuse of dominance by the Helsinki Regional Transport Authority (HSL). MaaS Global Ltd alleged that HSL had abused its dominant position, inter alia, by refusing to supply certain ticket products and by excessive pricing. The request for action was later withdrawn by MaaS Global Ltd and the FCCA did not see a need to continue investigations independently.

ii Outlook

As noted above, the Competition Act contains a provision on prioritisation of the FCCA's activities. Even before the entry into force of the prioritisation provision in Section 32 of the Competition Act, the FCCA closed a majority of its dominance investigations without further measures noting, inter alia, that its role is not to solve individual contractual disputes between parties but to ensure the functioning of the market and healthy competition.[17] Section 32 codifies the practice and grants the FCCA a right to eliminate more quickly cases that have only a minor impact on the economy.

The FCCA has applied the prioritisation provision regularly and is expected to continue to do so in the future. As a result of the provision, the FCCA is able to focus on the more serious restraints on competition. 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.[18]

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Chapter 4a of the Competition Act entrusts the FCCA with a supervisory task to enhance competition neutrality between public and private businesses. Pursuant to Chapter 4a, the FCCA has the power to intervene in the business activities of the municipalities, the joint municipal authorities and the state, as well as the entities over which they have control, if a public sector entity is distorting the conditions for competition or preventing the establishment or development of competition on the market.

In May 2017, the FCCA published guidelines on market-based pricing to help public sector entities assess the competition neutrality of their own activities.[19] The guidelines describe the principles and measures employed by the FCCA in the supervision of pricing, which consists of assessing both the setting of prices and the economic activity of the public sector entities.

So far, the FCCA has published 16 decisions concerning competition neutrality, with one new case published in 2021.

17 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.

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

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

i Significant cases

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

ii Outlook

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

V STATE AID

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

Furthermore, the Act on the Openness and Obligation to Provide Information on Economic Activities Concerning Certain Undertakings that applies to companies carrying out services of general economic interest facilitates the Commission's ability to monitor competition and state aid rules in Finland.[20]

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

i Significant cases

State aid during the covid-19 pandemic

Following the coronavirus outbreak, several Finnish support measures to help companies during the pandemic were approved in 2020 and 2021 under the European Commission's State Aid Temporary Framework.[21] For instance, the aviation sector in Finland was hit hard by the pandemic and, subsequently, the major airport operator and the national airline have received support from the state. In March 2021, the European Commission approved a €350 million aid package to enable Finland to support the major airport operator, Finavia, in different forms, namely a capital injection, a subordinated loan and a measure to partly compensate the company for losses directly linked to the outbreak.

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

Illegal state aid awarded to Helsingin Bussiliikenne Oy

A case concerning alleged illegal state aid to Finnish bus transport company Helsingin Bussiliikenne Oy (HelB) is currently pending appeal before the European General Court. 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.

20 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).

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

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), particularly considering the financial difficulties HelB was facing at the time the loans were granted. Subsequently, the European Commission considered the loans to constitute state aid in breach of EU rules, and Finland was ordered to recover the aid from HelB. During the investigation, HelB's assets and business operations were sold to one of its competitors. According to the Commission, the new owner became the economic successor to HelB and therefore also became responsible for repaying the incompatible state aid.

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 because the courts have omitted to consider the applicability of the state aid rules or to follow the relevant procedures in their decision-making. The cases concerned, inter alia, district heating, the sale of land and guarantees.[22]

iii Outlook

In June 2017, the Finnish Media Federation, an advocacy organisation for the Finnish media industry and printing companies, lodged a complaint to the European Commission claiming that the public funding of Yleisradio Oy's (Yle) textual journalistic online content constitutes prohibited state aid. Yle is a national media company owned mostly by the state and its operations are funded primarily through the Public Broadcasting Tax. According to the Finnish Media Federation, the provision of textual journalism online is not to be considered broadcasting under the Amsterdam Protocol and the Commission Communication on public service broadcasting.[23] Instead, the services in question should be evaluated under the EU doctrine for services of general economic interest. The Finnish Media Federation argued that since a private supply of these services already existed in the Finnish market, there was no need to qualify textual journalistic online content as a service of general economic interest. In addition, the production of Yle's wide textual journalistic online content leads to a disproportionate distortion of competition.

Following the complaint, the Finnish authorities engaged in informal discussion with the European Commission. Further, a governmental proposal submitted to Parliament in December 2020[24] 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 proposed amendment is still under consideration.

22 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.

23 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).

24 Government Bill 250/2020.

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

The majority of notified concentrations are cleared in Phase I. In 2021, the FCCA issued 34 merger decisions and Phase II investigations were initiated in two cases.

i Significant cases

Conditional FCCA approval for Altia Oyj/Arcus ASA merger

The FCCA approved conditionally the merger between alcoholic beverage companies Altia and Arcus, both active in the Nordic market for the manufacture, import and distribution of spirits and wines. The parties to the transaction had overlapping activities in several alcoholic beverage categories and the FCCA identified significant adverse effects on competition in the sales of aquavit and berry liqueurs to the national retail monopoly, Alko, and in the sale of aquavit to HoReCa customers, since the markets would have been highly concentrated post-merger.

The parties eliminated the competition concerns by proposing commitments to the FCCA, according to which Altia undertook to sell a certain aquavit brand and Arcus committed to terminate a distribution agreement for a certain liqueur brand. The commitment to divest the aquavit brand was enhanced with an upfront buyer requirement – the first time in the history of Finnish merger control an upfront-buyer provision has been required.

Conditional FCCA approval for acquisition of Fidelix Holding Oy by Assemblin AB (Triton)

The FCCA approved conditionally the acquisition of Fidelix Holding Oy by Assemblin AB in July 2021. Assemblin is an installation and service operator providing expert services related to electrical, heating, sanitation, ventilation and automation work in the Nordics, whereas Fidelix offers systems and services related to building automation and building

technology maintenance services in Finland and Sweden. The FCCA found after lengthy in-depth investigations that the acquisition, if approved unconditionally, would significantly impede effective competition in the tendering process for construction automation in certain regions since the parties' combined market share would be remarkably high.

Assemblin proposed remedies that sufficiently met the competition concerns raised by the FCCA. These consisted of the company's commitment to divest certain operations coupled with its commitment to take care, with its best efforts, that the acquirer of divested operations could also agree on a certain system partner contract. To this end, Assemblin committed also to divest certain related and necessary assets to the buyer. In this case also, the remedies included an upfront-buyer requirement as a condition for the approval.

Conditional FCCA approval for acquisition of Heinon Tukku Oy by Valio Oy

In June 2021, the FCCA approved, subject to conditions, the acquisition in which Valio Oy purchased Heinon Tukku Oy, both operating mainly in different levels of distribution chains on food markets. Valio is a company that mainly processes and markets dairy products but also provides services to food-service and industrial customers. Heinon Tukku, in turn, is a wholesaler of groceries whose main customers are food-service customers. Despite their overlapping business operations in public sector food-service procurement and in the dairy, industrial produce and frozen food supply markets, the FCCA did not find any competition concerns in these markets.

However, the authority concluded that Valio would be at risk of receiving information on the wholesale pricing of competing manufacturers and other terms and conditions used in contractual relationships through Heinon Tukku. To address these concerns, Valio committed to refrain, for the next 10 years, from disclosing confidential information it receives about its competitors to its organisation in a way that has adverse effects on competition.

ii Trends, developments and strategies

The FCCA has itself noted the need to investigate reform of Finnish merger control provisions, including assessing whether current turnover thresholds are still appropriate.[25] Accordingly, the FCCA published a report in June 2021 in which it proposes expanding the obligation to notify mergers. In the report, the FCCA proposes that the current merger control turnover thresholds be lowered and that the authority be granted the right to require notification even when the thresholds are not met. According to the report, should the proposed right not be granted to the authority, the turnover thresholds should be lowered even further than proposed. In addition, filing thresholds based on transaction value should be considered. The Finnish Ministry of Economic Affairs and Employment is currently assessing the need to change the current merger control turnover thresholds. An assessment memorandum on the possible changes was put out for consultation in February 2022.

iii Outlook

There has been a significant change in the length of merger control review periods. Among other things, in 2017 and 2018, the FCCA requested the Market Court to extend the deadline for Phase II investigations in four cases. This practice had previously been highly

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

exceptional. In 2019 and 2020, an extension to the deadline was requested in two cases in each year. Moreover, in both cases in 2020, the extension was requested twice. In 2021, an extension was requested twice in one case.

Developments are expected to be possible in Finnish merger control in the near future since the Finnish Ministry of Economic Affairs and Employment is currently assessing the changes proposed by the FCCA on merger control thresholds. However, as yet no timetable for the possible changes is known. The FCCA anticipates that there are likely to be problematic transactions with serious effects on competition.[26]

VII CONCLUSIONS

In reviewing Finnish competition law during the past few years, merger control has been a particularly active segment. In 2021, the FCCA issued 34 merger decisions and Phase II investigations were initiated in two cases. The FCCA submitted two penalty payment proposals in cartel cases to the Market Court. Both the Market Court and the Supreme Administrative Court ordered fines in one cartel case.

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

Appendix 1

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