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# Finland

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## Legislative developments

This section examines the most important legislative developments in the field of Finnish competition law.

### Amendment to the Competition Act grants the FCCA powers connected to competitive neutrality

Under the new chapter 4a of the Competition Act, the Finnish Competition and Consumer Authority (FCCA) has broader powers to investigate the economic activities of public entities. The new rules aim at ensuring competition neutrality between public sector and private sector market operators. From 1 September 2013 on, the FCCA has been able to intervene in market practices and structures connected to the economic activity of public bodies that actually or potentially distort or prevent competition by giving the public body competitive advantage. Distortive structures may include tax and other benefits, exclusivity rights, protection against bankruptcy or that a public entity is able to disregard commercial principles in its pricing.

The new competitive neutrality rules are inapplicable if the practice or structure directly results from legislation or if the intervention by the FCCA would prevent an undertaking from carrying out an important task related to the welfare of citizens, public safety or public interest. The FCCA does not have competence as such in relation to EU state aid rules. However, the FCCA has the right to scrutinise a distortive practice or structure even if it could be classified as a state aid. The legal basis for intervention in this situation is the legislation concerning competitive neutrality, not state aid legislation. The FCCA also has limited powers in relation to the so-called services of general economic interest (SGEI). Compliance with SGEI rules, as such, is not controlled by the FCCA. The FCCA lacks competence to assess whether the imposition of public service obligations on the entity providing those services creates a competitive neutrality problem. Nevertheless, if the entity adopts practices unnecessary for carrying out the public service obligation, the FCCA could identify competitive neutrality concerns and has competence to take action in the matter. According to the Municipality Act, business activities of a municipality must be turned into independent companies unless otherwise provided by law. The FCCA is now able to intervene in the pricing of a municipal entity in situations where there is no obligation to establish a company and the pricing is not market-based even when the entity does not have a dominant market position.

It the start of September 2013, the FCCA reformed its organiation by introducing a new group of specialists focusing on competitive neutrality. The group is a part of the Advocacy Unit of the FCCA.

### Amendment to the Competition Act establishes a market share threshold of 30 per cent for a dominant position in the daily consumer goods retail market

Amendments to the Competition Act aimed at controlling the high level of concentration in the Finnish daily consumer goods trade market came into force on 1 January 2014. According to the new rules, an undertaking or association of undertakings whose market share in the retail sale of daily consumers goods in Finland is at least 30 per cent is considered to have a dominant market position. The new legislation does not, however, have any impact on the conditions of what constitutes abuse of dominance.

In Finland, the trade in daily consumer goods is very concentrated. In the current market situation, the new legislation applies to the two biggest players, S Group and K Group, which together hold more than 80 per cent of the market. In practice, the new rules mean that the activities of these groups can be evaluated as activities of a dominant company without the need to prove the existence of a dominant position. The amendment applies both to purchasing and retail activities of the companies. However, the rules do not apply to individual regional cooperative stores belonging to the S Group or to individual shop owners that are part of the K Group unless the practices or measures result from complying with the decisions or guidelines of the central organisation or they are otherwise related to collective measures of the central organisation or the whole group.

### How has the FCCA approached the new rules?

The FCCA has not yet published any actual decisions applying the new rules on competitive neutrality or the daily consumer goods trade. The actual effect of the amendments therefore remains to be seen. However, the FCCA has examined certain retail sector practices, described in detail below. While no decisions have been made, the FCCA has emphasised that individual assessment, which takes consumer benefit into account, is essential in each case for establishing whether competition law has been breached. For example, the use of buyer power by a dominant company may have efficiency effects, which could result in consumers' benefit. The FCCA has also highlighted that abuse of dominance only includes practices that are not based on competition on merits.

### Criminalisation of cartel activities under discussion

Breaches of competition law do not currently carry specific criminal law sanctions in Finland, although it has been proposed that participation in a competition restriction could be punishable as fraud. The programme of the current Finnish government called for a review of the possibility and potential consequences of extending personal responsibility under criminal law to cartel activities. Two reports on the topic, commissioned by the FCCA and the Ministry of Employment and the Economy, were published in May 2014. While the reports found that grounds exist for introducing criminal law sanctions, they also stated that it could jeopardise the functioning of the leniency system (discussed in more detail below). The Ministry of Employment and the Economy intends to further assess the matter, as well as the possibility to impose a personal ban on business operations on individuals found guilty of cartel activities. No actual plans for introducing criminal law sanctions for competition law infringements currently exist.

## Merger control

This section briefly describes the relevant legislation on merger control, recent activities by the FCCA and case law.

### General remarks

Pursuant to the Competition Act, a concentration must be notified to the FCCA if:

- the combined worldwide turnover of the parties exceeds €350 million; and
- the turnover of each of at least two of the parties accrued from Finland exceeds €20 million per party.

The concepts of a concentration and a party to a concentration correspond to the respective EU concepts, which are defined in the EU Merger Regulation (No 139/2004). However, some differences to the EU Merger Regulation also exist; for example, there is no specific exemption for 'warehousing' structures.

At the end of 2013, the FCCA announced that it will assess the need to reform merger control rules and that it will especially consider the appropriateness of the thresholds. However, there have not been any measures or proposals related to the reassessment.

### Enforcement activities

During 2013, the FCCA issued 19 merger control decisions, of which 17 concentrations were approved in Phase I proceedings and two in Phase II proceedings. The figure is slightly smaller than in 2012. One of the concentrations approved in Phase II proceedings was subject to conditions. In 2013, the FCCA made no decisions of inapplicability nor carried out any proceedings for a failure to notify a concentration. No new applications to amend or repeal commitments given in earlier cases were made. As of May 2014, the FCCA has approved two concentrations in Phase II proceedings. The only one of these in which commitments were given is discussed below in more detail.

### When to notify?

A concentration must be notified before its implementation. In case the parties fail to notify a concentration or implement the concentration prior to the FCCA's clearance, a fine up to 10 per cent of the infringing party's turnover may be imposed. To date, the FCCA has not made such a proposal. In line with the EU Merger Regulation, the Competition Act provides for a possibility to notify the merger already when the probability of signing is considered high enough. The probability can be demonstrated with, for example, a signed letter of intent, a memorandum of understanding or a public takeover bid. This allows for a speedier assessment in comparison to a post-signing notification. In case of essentially inadequate notifications, the official investigation procedure only begins once an adequate notification has been made.

### Procedural deadlines

The investigation procedure consists of two phases. Phase I of the procedure takes one month at the most, during which time the FCCA has to clear the concentration unconditionally or under conditions, or to decide upon initiating Phase II investigations. The Phase II investigations take three months at the most, although the Market Court may extend the period by two months. The FCCA will only apply for such an extension in exceptional situations. In case the FCCA fails to act within the deadlines, the concentration is regarded as cleared. If the parties fail to provide correct or sufficient information, the FCCA has the power to freeze its own procedural deadlines ('stopping the clock').

### Case study

On 25 November 2013, the FCCA made a decision to initiate further proceedings in a concentration where two chains of fitness centres, Elixia and SATS, fell under the control of the same party, the international capital Investor Altor Fund III. The previous owner of SATS, TryghedsGruppen smba, continued to exercise joint control over the chain. Both Elixia and SATS are full-service fitness centres and they had overlapping business in the areas of Helsinki, Espoo, Vantaa, Turku and Jyväskylä.

The FCCA concluded investigations on the competition effects of the concentration in the fitness centre markets in the aforementioned city areas. The FCCA applied for the first time the upward pricing pressure (UPP) method, which has become more and more common in the international practice of competition authorities. Basically, the UPP method estimates the incentive of the concentration to raise prices. In practice, the UPP method was implemented through an economic analysis on the cost structures of the parties and with a survey that was carried out in 2013 among the customers of Elixia and SATS. The customers found that Elixia and SATS were each others' closest competitors and that there were few alternatives. This aspect was essential in the FCCA's assessment of the competition effects.

The FCCA's conclusion was that the concentration would significantly impede effective competition in Espoo and Vantaa and would have probably led to price increases. Therefore, in February 2014, the concentration was only approved on the condition that the overlapping business operations in Espoo and Vantaa be divested to third parties. The competing fitness centre chain Fressi ended up acquiring the two SATS fitness centres that were subject to the commitment.

## Antitrust

This section examines Finnish legislation and recent case law on anti-competitive practices.

### General remarks

The Finnish rules generally correspond to articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (with the addition of the special rules on dominant market position in the daily consumer goods market discussed above). Antitrust rules in Finland are therefore in line with those of the EU.

### The FCCA's investigative powers

Upon a request by the FCCA, undertakings are obliged to provide all information necessary for the FCCA's investigations concerning potential restrictions to competition. In case there is reason to believe that a person has contributed to the implementation of a competition restriction, the FCCA may, where necessary for the pursuit of an investigation, invite them to appear before the FCCA. However, if the individual chooses not to appear, no sanctions may be imposed on him or her.

In addition, the FCCA is empowered to conduct inspections in the business premises of an undertaking and certain other premises, such as at a private home belonging to a representative of the undertaking. Inspections in the latter premises require advance permission from the Market Court. In order to enforce compliance with the measures taken, the FCCA may impose a periodic penalty payment on an undertaking for failure to cooperate. The decision to order an undertaking to actually pay the penalty sum may only be made by the Market Court and the Supreme Administrative Court.

### The FCCA's priorities and recent activities

Certain practices in the retail sector have been under scrutiny of the FCCA in 2013 and 2014. One of these practices is the wide usage of bonus card systems. The FCCA is currently investigating, from the point of view of abuse of dominance rules, if these systems create a loyalty effect that impacts the functioning of the market and the consumers' freedom of choice. In May 2014, the FCCA ordered a survey to be conducted among consumers in order to evaluate which factors are relevant in their purchase decisions.

The FCCA is also investigating different ways of providing the consumer goods industry with information on retail-level sales in order to benefit competition. An earlier FCCA investigation led to the abandonment of the previous system used for gathering market information.

In May 2014, the FCCA conducted inspections in certain companies operating on the market of interpretation services for disabled. The FCCA suspects that practices between the companies may have infringed the Competition Act or the TFEU.

### Imposition and calculation of fines

The calculation of fines is based on an overall assessment of the infringement with particular attention paid to its nature, extent, duration and the degree of gravity. The total amount of a fine may not exceed 10 per cent of the undertaking's turnover during the year it was last involved in the infringement. Fines may be imposed on an undertaking only if the FCCA has filed a proposal to the Market Court within five years of the date on which the infringement occurred or, in case of a continuous infringement, within five years of the date on which the infringement ended. Measures taken by the FCCA to investigate the infringement, however, reset the limitation period. In any case, fines may not be imposed where a proposal to the Market Court has not been filed within 10 years of the infringement or its ending. As regards the concept of succession, the Finnish rules on the imposition of fines are similar to those of the EU.

### Leniency

The Finnish leniency system follows the leniency policy of the European Commission and the model programme of the European Competition Network. The FCCA has published a set of guidelines on the application of leniency rules. According to publicly available information, only two leniency applications out of a dozen submitted since 2004 have led to the uncovering of a cartel.

The right of access to documents is relatively extensive in Finland. However, the authorities have applied a more restricted approach to that right in leniency cases in order to protect leniency applicants and the functioning of the system. According to the Act on the Openness of Government Activities, access to documents may not be provided when it would compromise an investigation or the purpose of an investigation. In addition, section 17 of the Competition Act substantially restricts the use of the information submitted to the FCCA when applying for leniency. If a leniency applicant was placed in a disadvantageous position in subsequent proceedings, the incentives to file a leniency application would be seriously undermined. To secure the effective implementation of competition legislation and to protect a leniency applicant where necessary, leniency documents are generally defined as confidential. These rules seem to be in line with the recent EU case law on the subject.

### Private enforcement

2013 and 2014 have been important years for private enforcement of competition law in Finland. In 2013, the Helsinki District Court ordered companies that had participated in a cartel that operated on the Finnish asphalt market in 1994–2002 to pay nearly €40 million in damages as well as €20–30 million in interest and legal expenses to a number of municipalities. The claims were follow-on claims based on the infringement decision of the Supreme Administrative Court from 2009, in which the Court ordered Lemminkäinen, VLT-Trading, Skanska Asfaltti, NCC Roads, SA-Capital, Rudus Asfaltti and Super Asfaltti to pay a total of €82.6 million in cartel fines.

In 41 damage claims brought against the asphalt companies in the Helsinki District Court, the State of Finland and 40 local authorities claimed compensation for the overcharges they paid for paving work. The companies contested the claims. The District Court dismissed the action by state and obligated it to compensate the companies for their legal costs. The District Court held that the National Board of Public Roads must have been aware of the cartel already in 1994 and evidence showed state entities actually participated in the cartel from 1998 onwards. Since the state approved the activity, participated in it and had apparently benefited from it, no damage has been caused to the state. However, the claims by municipalities were generally found to be justified. The court found that the municipalities had been overcharged by 15 per cent or by 20 per cent and awarded €37.4 million as a capital sum. The defendants have appealed the judgments, as have several claimants regarding the compensation sums.

In 2014, the Helsinki District Court gave two more judgments in cartel damage cases. The first one concerned a group of actions following the decision of the Market Court, which established that UPM-Kymmene, Stora Enso and Metsäliitto had exchanged commercially sensitive information in order to decrease the purchase price of raw wood. The imposed fines totalled €51 million. The claims, which were made by certain private forest owners, were dismissed in their entirety since the Court found that the right for compensation had been expired. A much higher number of claims by the state, municipalities, parishes and many other private forest owners is yet to be reviewed.

The other case concerned a cartel in the market of spare car parts, in which the Market Court fined car parts wholesale dealers HL Group, Kaha, Koivunen and Örum a total of €1 million for collaborating prices in 2009. The ruling was confirmed by the Supreme Administrative Court in 2012. A competitor, Atoy, raised an action against the fined companies and Arwidson, which was the whistleblower in the cartel. According to the claimant, the practices of the cartel companies, such as the collective boycott, caused Atoy significant damages. The Helsinki District Court dismissed the action in its entirety; it held that while the infringement may have contributed to the claimant's various difficulties, it was not the real reason for any financial damages suffered by the claimant.

### Expiry of the right to compensation

As regards the expiry of the right to compensation, the Finnish damages law places great weight on when the party that suffered damage became or should have become aware of the occurrence of the damage. The judgments described in the previous chapter were everything but consistent with respect to the date from which the claimant should have been aware of the occurrence of the damage.

In the asphalt cartel case, the Helsinki District Court found that the claimant became aware of the infringement to the extent that it had a de facto possibility to raise actions when the Supreme Administrative Court gave its final judgment. The court stated that, contrary to the view of the defendants, suspicion by the FCCA, no matter how widely reported in the media, could not constitute a

sufficient level of awareness needed to raise action. The court went further and added that also the proposal of the FCCA to the Market Court contains nothing more than a claim of a cartel. Whether the claim is correct or incorrect will be decided either by the Market Court or the Supreme Administrative Court.

The Helsinki District Court applied the same rule in a damages case following the spare parts cartel. According to the District Court, the claimant could not have been aware of the occurrence of damage before the ruling of the Supreme Administrative Court.

However, in an interlocutory ruling in a damages case against Kemira issued in July 2013, the same court held that the claimant has a certain duty to make inquiries. According to a fine decision made by the European Commission on 3 May 2006, Kemira participated with eight other chemical producers in a cartel on the hydrogen peroxide and perborate markets. The District Court stated that this was the moment from which a party active in the relevant market should have become aware of the cartel. This was the case even though only a press release on the decision was published on the day in question, with the publication of the actual fine decision taking place a year later. The possibility to appeal the decision also did not play a part in this. However, the Court did state that a statement of objections cannot cause the awareness needed since it only expresses the suspicion of the Commission.

A third approach was employed by the same court in the aforementioned *Raw Wood* cartel case in March 2014. Unlike in the other cases so far, the Helsinki District Court found that the claimants' right to claim damages had become time-barred. The District Court held that the claims should have been brought against the forest companies within five years from the date when the FCCA announced that it is investigating a cartel on purchase market of raw wood following a leniency application. According to the court, the announcement was so widely reported that the claimants must have been aware of it. The District Court also found that the final judgment of the Market Court (the case was not appealed in the Supreme Administrative Court) cannot be interpreted as the starting point of awareness since the judgment did not take a stand on the existence or extent of damages, and therefore it could not have increased the awareness of the claimant with regard to right for compensation.

Damages for competition law infringements can be claimed under the Competition Act as well as certain other laws. The *Asphalt*, *Car Parts* and *Raw Wood* cases have been appealed, so it is still too early to draw any final conclusions on how limitation in competition law damage claims will be treated in Finland. It should be noted that all of the above cases were based on the old Competition Restrictions Act. The new Competition Act, which entered into force in late 2011, has clarified the date from which the expiry of the right to compensation starts to run. According to the new Competition Act, a right to damages does not become time-barred before 10 years from the infringement has passed or, in case the FCCA has initiated proceedings in the matter, one year from the final decision confirming the infringement.

### Abuse of dominant position

Infringements related to abuse of dominant position have received increasing attention from the FCCA during the last few years. The pending *Valio* case in the Market Court and the new fixed 30 per cent threshold in daily consumer goods retail market, as well as the ongoing investigations on the bonus card arrangements, are the main recent developments.

### Case study: the FCCA demands a 70 million fine on Valio for predatory pricing

In December 2012, the FCCA proposed that the Market Court impose a €70 million fine on the Finnish dairy company Valio Oy. The FCCA held that Valio had abused its dominant position in the production and wholesale market of fresh milk. The FCCA claimed that Valio had priced its fresh milk below average variable costs. Furthermore, the FCCA also found documentary evidence on Valio's intention to force its competitors out of the market. The Market Court decision on the matter was expected in late spring 2014, but as of May a decision has not yet been given.

The FCCA applied the 'as efficient competitor' test in its assessment. According to the FCCA, Valio was capable of excluding an equally efficient competitor from the market because it priced below cost. The FCCA's assessment concerning below-cost pricing was based on the costs accrued by Valio when operating in the relevant market. The FCCA adopted Valio's internal calculations as a starting point and followed Valio's division between fixed and variable costs. The FCCA found that the raw milk costs in Valio's internal calculations were strongly influenced by the cooperative-based business form employed by Valio as well as its significant market power, not by the efficiency of the production. The FCCA stated that the requirements for assessing the costs of the raw milk based on the sums paid by Valio's competitors instead of those paid by Valio had been met. However, the FCCA chose to apply the 'as efficient competitor' test by using the net prices paid by Valio to its producers as the price of the raw material, arguing that these prices were more favourable to Valio from a legal certainty perspective and that the net prices were essentially the lowest possible price a competitor could pay to producers.

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Katri Joenpolvi has extensive experience in demanding competition law assignments, including complex merger cases, and assists clients in competition law matters and EU law litigation. She also develops antitrust compliance programmes and assists clients in regulatory matters.

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