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Guidelines on compliance with competition legislation

Confederation of Finnish Industries

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1 INTRODUCTION

1.1 Background

The purpose of competition legislation is to ensure that economic competition is not interfered with in the market. Competition legislation protects the competitive mechanism, not individual contractual relationships or individual companies.

In effective competition, companies are free to enter the market, and their operations in the market are based on the independent decision-making of each company. Effective competition encourages companies to use their resources efficiently and develop better products and services. At the same time, consumers benefit from better services, more extensive selections and lower prices.

Competition restrictions are practices that reduce economic efficiency or restrict the operations of other companies. Competition restrictions that are considered to have mostly harmful impacts are prohibited by competition legislation. The most significant competition restrictions include cartels and abuse of a dominant market position, for example.

Agreements and procedures restricting competition are illegal. Violations of competition legislation may lead to significant financial sanctions and other consequences for companies, such as operational or structural changes being required by the authorities. More than 100 countries have national competition laws. Although the content of the laws varies somewhat by country, the key prohibitions are similar in most countries. In the EU member states in particular, the norms concerning competition restrictions are almost identical because of the European Single Market and the strong harmonisation impact of EU legislation, especially in matters related to competition restrictions. There are, however, differences between countries in terms of the procedural rules and the consequences of violations.

The current Finnish Competition Act (948/2011) entered into force on 1 November 2011. It replaced the Act on Competition Restrictions from 1992. The provisions of the Competition Act correspond to the competition rules of the Treaty on the Functioning of the European Union (TFEU) (Articles 101 and 102). In addition, national competition law provides for competition neutrality and separately for a dominant position in the grocery trade. There are no corresponding provisions in EU legislation. The Act on Antitrust Damages Actions (1077/2016) is also worth taking into account. It is based on the corresponding EU directive (2014/104/EU).

The most recent significant amendments (210/2021) to the Competition Act entered into force on 24 June 2021. The amendments were largely based on the so-called ECN+ directive and its implementation. Some of the changes have significant impacts on companies and industry organisations. The changes concerned, for example, hearings, requests for information and audit authorisations of the Finnish Competition and Consumer Authority (FCCA), which is the supervisory authority. In general, the authorisations of the FCCA were extended. Changes were also made to further specify the calculation of fines for competition breaches. The new calculation rules for fines only concern the FCCA. They do not apply to the Market Court and the Supreme Administrative Court, which continue to have extensive discretionary power in assessing the size of the fines. The provisions on exemptions from fines and reductions in fines were also revised. Consequences for procedural breaches, as well as structural corrective measures, were added as new provisions to the Competition Act. Fines can now be imposed on companies not only for competition restrictions, but also for certain procedural violations in connection with inspections and other investigative measures carried out by the FCCA. A significant amendment arising from the ECN+ directive is the FCCA's authority to propose the imposition of structural corrective measures to the Market Court. Structural corrective measures include obligations to divest certain business operations or shares, for example. In addition to these amendments, fines for industry organisations were made stricter. If an industry organisation is unable to pay a fine imposed on it, its member companies may have to pay the fine if certain conditions are met. Minor technical amendments have been made to the Competition Act since the summer of 2021.

1.2 Purpose of the guidelines

It is absolutely necessary to know the key provisions of competition legislation, and the Confederation of Finnish Industries (EK) and its member associations must comply with the provisions in all their operations. These guidelines provide general instructions on how organisations should take the rules of competition law into account at their meetings and in their other activities. The guidelines are intended for the personnel of EK and its member associations, as well as company representatives who participate in the activities of EK or its member associations.

The guidelines help them to identify situations and procedures that typically involve risks related to competition law in the activities of associations. However, since the application of the competition rules usually requires case-specific assessment, the guidelines do not provide comprehensive answers for all possible situations. If it is uncertain whether a procedure is permitted or prohibited, the issue must always be resolved in advance before proceeding with the procedure. The competition authorities cannot provide permission in advance, nor can they provide a certificate of the lawfulness of the intended procedure, but this does not prevent informal discussions with the authorities to support

the formation of an opinion. In many situations, it is recommendable to turn to lawyers specialising in competition law.

1.3 The role of EK and its member associations

The lobbying carried out by EK and its member associations and meetings between various bodies are completely permitted and acceptable. Normal, acceptable lobbying includes, for example, influencing legislation or the authorities' operations in a specific field by means of initiatives, statements or similar. The purpose of lobbying is to have a general impact on improving the operating conditions of business and industry or companies in a specific sector, in addition to ensuring that the interests of companies and business and industry are taken into account in regulatory projects or other projects implemented by the authorities. The competition legislation does not prevent this.

However, industry organisations are forums in which companies operating and competing in the same sector meet and engage in discussions. Meetings between competitors, as well as the discussions conducted and information exchanged between competitors in connection with such meetings, are always of interest to the competition authorities, because competition restrictions have in some cases been implemented through organisations. It is therefore particularly important that the operations of EK and its member associations comply with the competition rules that apply to relationships between competitors.

EK and its member associations are considered to be corporate alliances for the purposes of competition legislation. Decisions, recommendations and similar measures that may have a harmonising impact on their member companies' competition behaviour are therefore prohibited.

An industry organisation may have such a strong position in the market that it is considered to hold a dominant market position. This could be the case, for example, with an industry organisation that is the only operator in its field providing licences or certificates that are necessary for companies to operate in the sector. However, it is more typical for an individual company than it is for an alliance of companies or an industry organisation to have a dominant market position. Having a dominant market position is not prohibited, but it is prohibited to abuse such a position.

Even if an industry organisation or a company does not have a dominant market position, it is subject to a prohibition on entering into anti-competitive agreements with its competitors (cartel prohibition) and a prohibition on entering into anti-competitive agreements with companies that are directly above or below the company in the sales or distribution chain (prohibition on vertical competition restrictions).

2 ANTI-COMPETITIVE COOPERATION AND THE CARTEL PROHIBITION

2.1 What does the cartel prohibition mean?

The basic premise of competition law is that **companies must make their business decisions independently.**

All cooperation and procedures are prohibited that enable companies to harmonise their competition behaviour in the market. First, there is a prohibition on cooperation **aimed** to prevent, restrict or distort competition. Second, there is a prohibition on such agreements, cooperation arrangements and mutual understanding between companies that have an acceptable purpose, but that may **lead** to restricted or distorted competition. This is called the **cartel prohibition** in competition law.

2.2 How can violations occur?

In practice, prohibited cooperation can take place in many ways, including the following, for example:

- A written or oral agreement (gentleman's agreement) or otherwise harmonised procedures
- A decision or recommendation made by an industry organisation
- As a result of the exchange of information
- A company participates in a meeting that is intended to restrict competition or that has a restrictive impact on competition, and the company does not actively dissociate itself from a prohibited cooperation
- The rules of an industry organisation include provisions that go against the cartel prohibition.

The list is not comprehensive. Competition restrictions can also be implemented in other ways. Competition restrictions may come into existence, **even if the parties have not entered into a legally binding agreement or a similar legal act.**

EXAMPLE 1

At an industry organisation meeting, one of the participants suggests that all the companies involved should increase their prices due to the reduced availability of raw materials. The proposal is approved and recorded in the minutes as a recommendation issued by the organisation.

➥ This is a case of prohibited cooperation.

EXAMPLE 2

At an industry organisation meeting, one of the participants suggests that all the companies involved should increase their prices due to the reduced availability of raw materials. None of the participants respond to the proposal, but all the companies represented at the meeting later implement the price increase.

➥ This is a case of prohibited cooperation.

EXAMPLE 3

At an industry organisation meeting, one of the participants suggests that even though the prices of raw materials are decreasing, the prices of end products should not be reduced, so that the traditionally weak profitability of the sector can be improved. Some participants support the idea, while others consider the discussion inappropriate or do not wish to express their opinion. No one leaves the meeting, although the discussion continues. The companies do not change their pricing.

➥ This is a case of forbidden competition, and all the participants can be considered guilty of prohibited cooperation, because they did not leave the meeting and because they did not expressly and verifiably dissociate themselves from discussing a prohibited topic.

2.3 What kind of cooperation is forbidden?

The following are examples of forms of cooperation that are **generally always prohibited:**

- **Price cartels and price fixing**
  - Price cartels and price fixing are forms of prohibited cooperation, even if the agreed price is reasonable or is not eventually realised in the market. Furthermore, price cartels and price fixing are forms of prohibited cooperation, even if the counterparty is aware of the cooperation between the sellers or is involved in discussions concerning the cooperation. For example, competing sellers are not allowed to agree on sales prices, even if the buyer is involved in the negotiations.
  - The price cartel prohibition covers, for example, agreements concerning sales prices, purchase prices, price increase percentages, the timing of price increases, discounts, profit margins, price ranges, pricing practices, price structures, price calculation formulas, pricing grounds, price components, credit and warranty practices and terms of payment.

- **Division of sources of supply, customers or markets**
  - Companies must not agree with competitors on areas of operation or other arrangements related to purchases or sales with the aim of dividing sources of supply, markets or customers between companies.

- **Collective boycotts**
  - Agreements or mutual understanding under which competitors unanimously refuse or threaten to refuse to enter into business relationships with a particular competitor, customer or supplier are prohibited.
  - A collective boycott is, for example, a procedure through which companies in a specific sector, under the industry organisation, decide to prepare a standard for the sector that prevents foreign competitors from entering the domestic market. An industry organisation participating in such a procedure may also be guilty of abusing a dominant market position.
  - An industry organisation not accepting new members on equal and non-discriminatory terms may also be considered to be involved in a collective boycott.

- **Production restrictions**
  - Agreements that prohibit a party from manufacturing certain products, as well as agreements that restrict investments, production capacity or the quantity of products intended for sale, are prohibited.

- **Exchange of confidential information and compilation of statistics containing such information**
  - Prohibited exchange of information means that a competitor is made aware, in advance, of such information concerning a company's market behaviour that would normally be confidential. This procedure eliminates or reduces the uncertainty that the company has over its competitors' future operations or reactions. Confidential information includes information listed under prohibited topics of discussion in Section 2.4 of these guidelines and that is not available from public sources.
  - Exchanging confidential information is also prohibited in cases where the information is collected by a third party (e.g. a research institute), but companies in the sector use the information to harmonise their price levels or other market behaviour.

The following are examples of forms of cooperation that are **often problematic** in terms of competition law:

- **Sales and marketing cooperation**
  - Competitors' sales cooperation and other cooperation concerning making products available on the market is often prohibited, especially if it includes price cooperation.
  - Joint brand marketing – for example, a joint advertisement published in a newspaper or magazine to improve product visibility – is not prohibited. However, advertising in which various sellers announce a joint sales price for their products may be regarded as prohibited cooperation. On the other hand,

campaign cooperation that also involves recommended or maximum prices may be permitted if it meets the requirements for an efficiency defence (see Section 2.7).
    - Online portals in which several operators provide information about their products do not constitute an infringement of competition rules. In practice, however, it must be ensured that their operations do not involve, for example, price cooperation or prohibited exchange of confidential information.

- **Joint tenders**
    - Cooperation between competitors on tenders is usually prohibited. It is only allowed if the company is not able to supply all the products or services required in the invitation to tender on its own.

The following are examples of forms of cooperation that may be problematic in terms of competition law in certain circumstances, which is why their **permissibility must always be checked separately before entering into an arrangement in terms of national regulations** and the latest amendments to the EU competition legislation, as well as in light of the European Commission's guidelines:

- **Standardisation**
    - There must be objective grounds for standards (e.g. quality and safety standards) prepared by an industry organisation for its sector, and they must not prevent any individual company or a group of companies from competing.

- **Research and development cooperation**
    - According to the EU legislation, research and development cooperation (R&D) between competitors is permitted under certain conditions. R&D cooperation can take many forms.

- **Purchasing cooperation**
    - The purpose of joint purchasing agreements is often to improve business efficiency by reducing procurement and transaction costs. However, purchasing cooperation often involves exchanging information that is sensitive in terms of competition law, which is why such cooperation involves a risk of competition restrictions.

- **Production cooperation**
    - Production cooperation has the same purpose as purchasing cooperation: to improve operational efficiency by reducing production costs. This involves the same types of risks as purchasing cooperation and specialisation agreements.

- **Specialisation agreements**
    - A specialisation agreement is an agreement between two or more parties operating in the same product market through which a party or parties agree to

discontinue, in full or in part, the manufacture of certain products and to purchase them from another party, which in turn agrees to produce and deliver the products in question.

- **Joint ventures**
  - A joint venture is a form of cooperation between companies in which the joint venture is jointly controlled by two or more companies. The joint venture carries out the duties of an independent company, and its operations are usually continuous or long-term. Such a joint venture falls within the scope of the provisions of the competition law on the supervision of acquisitions, because joint ventures are considered to have restrictive impacts on competition in some cases.

2.4 What cannot be discussed between competitors?

As a rule, any exchange of confidential information is prohibited. Confidential information is any information that is current and not available from public sources at the same level of accuracy, and that may have a theoretical or actual impact on companies' competitive and market behaviour. By exchanging such information, companies in practice eliminate or reduce the uncertainty they usually have over the future activities or solutions of their competitors.

Confidential information must not be discussed at meetings organised by EK or in connection with such meetings. The competition authorities pay particular attention to all discussions and exchange of information that concern companies' future or recent pricing.

The following are examples of topics of discussion that are usually **permitted:**

- General lobbying of the interests of business and industry or a specific sector towards the authorities and political decision-makers
- Labour market matters
- Initiatives, statements and regulatory changes
- Occupational and product safety and environmental protection
- Technical standards open to all
- Quality control throughout the sector
- Training

The following are examples of **prohibited** topics of discussion:

- Prices (e.g. purchase prices of raw materials or sales prices of products)
- Factors affecting prices (e.g. hourly rates, total price, price components)
- Information based on which prices can be concluded (e.g. cost structure and/or profit target)

- Sales areas
- Sources of supply or areas of purchase
- Purchase or sales volumes
- Market shares
- Production targets, investments, shutdowns and utilisation rates at production plants
- Stock situation
- Cost structure
- Customers and their purchasing behaviour
- Credit terms, warranty periods
- Suppliers of commodities and their conditions of sale
- Tenders made or to be made
- Approach to a specific customer, group of customers, supplier of goods, group of suppliers or a third competitor
- Other confidential technical or commercial information.

These topics are forbidden in all interaction between competitors, including involvement in the activities of an industry organisation. Prohibited topics must not be discussed at meetings or other contexts, such as breaks during meetings or social events (e.g. dinners, sports events).

Confidential information that has been made available to EK for the compilation of statistics must not be discussed at meetings. It must not be disclosed to member associations, even in cases where the representative of a company is a member of a representative body of EK. Separate instructions for industry organisation meetings are provided in Section 2.6 of these guidelines. Statistics are discussed in more detail in Section 2.5.

Sometimes it is difficult to determine whether a procedure is permitted or prohibited. It is essential to keep the following general guidelines in mind:

Procedures that enable any harmonisation of the business operations of competing companies are prohibited, because companies must make their decisions completely independently.
Discussions that eliminate the uncertainty that usually prevails over competitors' future market behaviour are prohibited.

EXAMPLE 4

At an industry organisation meeting, the participants discuss the fact that the established warranty practice in the sector leads to long warranty periods that unnecessarily increase the price levels of products. The participants believe that a consensus over shorter warranty periods would decrease consumer prices.

➥ The companies violate the cartel prohibition. Competing companies must not agree on or seek a consensus over the terms of delivery of products, including prices and warranty periods.

EXAMPLE 5

During a break in the meeting, the representatives of competing companies discuss the reduced demand for products and come to the conclusion that everyone should take care of their existing customers in order to navigate through the bad times.

➥ The companies violate the cartel prohibition by dividing the market between them.

EXAMPLE 6

A public-sector customer carries out a competitive bidding process. The invitation to tender differs substantially from normal trading practices and includes unreasonable conditions. The issue is considered for discussion at an industry organisation meeting, because such a discussion is the most effective way to address the unreasonable conditions.

➥ Discussion of such issues within an industry organisation is likely to lead to a situation where the organisation and its members harmonise their behaviour towards the customer in question and the related business relationships or tenders to be submitted as part of the competitive bidding process. Such discussions may lead to a collective boycott and are therefore prohibited.

EXAMPLE 7

Competing companies have a working group within an industry organisation to discuss best practices related to occupational safety. The purpose of the working group is to improve safety at work throughout the sector. At a meeting of the group, it is noted that there are certain safety deficiencies in the standard work equipment of different manufacturers, but that there is a new model in which these issues have been resolved. Only one machinery company manufactures this new model. At the meeting, the members of the industry organisation unanimously decide to purchase only the new model from that point on, so that accidents can be reduced throughout the sector.

➥ The purpose of the companies is to improve the level of occupational safety throughout the sector. However, if the purchases of machinery are concentrated with a single supplier, this will lead to a situation where purchasing behaviour is harmonised – that is, a competition restriction. Such discussions are therefore prohibited.

EXAMPLE 8

The federation is preparing guidelines on public procurement in a specific sector in cooperation with municipalities. The purpose is to create sensible rules for competitive bidding and reduce the number of unnecessary complaints filed with the Market Court. The actual competitive bidding processes will be carried out separately later.

➥ This type of proactive and general influencing concerning the authorities' operating methods is acceptable lobbying. However, in the actual competitive bidding process, the companies in the sector must submit their tenders independently without mutual interaction or discussions, and competitive bidding processes in progress must not be discussed by the federation's bodies.

2.5 How should the cartel prohibition be taken into account in the compilation of statistics?

EK and its member associations compile various statistics for the purposes of lobbying and providing information. When compiling statistics, it must be taken into account that the **exchange of confidential information is prohibited**, regardless of the method of implementation. Companies must not exchange confidential information directly, and such information must not be exchanged through statistics compiled by an industry organisation or a third party.

However, statistics compiled by the authorities are not usually problematic in terms of competition law. The federation may also inform its members about such statistics or forward information contained in statistics compiled by the authorities or a third party to its members. However, this requires that the federation does not issue any recommendations or guidelines for action to its members in connection with this.

In particular, any guidelines related to pricing in connection with statistics (e.g. "with the increase of raw material and salary costs, there is reason to consider price adjustments") are prohibited. It is good to keep in mind that individual companies may also be guilty of prohibited price signalling if they publicly announce that they are planning to implement price increases.

Statistics compiled for the purpose of labour market activities are not subject to the same

kind of requirements as statistics compiled for lobbying purposes, because labour market activities are excluded from the scope of application of the Competition Act.

EK must ensure that:

- The statistics compiled by EK do not disclose business secrets or comparable information (see Section 2.4)
- Information about individual companies cannot be identified directly or indirectly from statistical data unless the data is "historical" at its time of publication – that is, has been released at least 6–12 months earlier on average, depending on the sector.
- Each data category includes the data of at least four companies, and the data of individual companies cannot be identified, not even indirectly.
- Company-specific information is at least 12 months old and is only published once a year (for example, information from 2018 can be published in January 2019, and information from 2019 can be published in January 2020).

In general, it is forbidden to exchange – through statistics, for example – information that can be exploited in **companies' future competitive behaviour** due to its nature. When assessing whether the compilation of statistics is permitted, the following basic principles should be kept in mind:

- The more detailed the information is, the more likely it is to affect competition.
- The more current the information is, the more likely it is to affect competition.
- The compilation of statistics is viewed more critically in markets that are concentrated and in which only a few companies operate than in markets with a large number of equally strong operators.
- The more likely it is that the transparency of information leads to disclosure of companies' competitive methods, the greater the risk that the exchange of information is prohibited.
- The greater the combined market share of the companies participating in cooperation is, the greater the risk is that the exchange of current information is prohibited.
- If the circle of users of information is limited, meaning that the information is not available to competitors or customers, the information is usually considered confidential in such a way that its exchange between competitors is problematic in terms of competition law.
- If the parties meet regularly to discuss the information or otherwise analyse it together, it is more likely that the exchange of information is prohibited.

Statistical activities should be organised in such a way that confidential data is processed only by people who compile statistics or whose role requires access to information concerning an individual company. It is recommended that such people are required to sign non-disclosure agreements. Other people must not have access to confidential information. This must be ensured, for example, through restricted access to files and by

storing documents securely so that they are not available to people other than those who process the data in question.

Operating principles and persons to whom data can be disclosed must be determined for statistical purposes. The storage and erasure of confidential data must be organised in such a way that the data is not disclosed to anyone who is not entitled to access the data. Disclosure of company-specific information is prohibited, especially to persons working for competitors, even if they are members of the organisation's representative bodies.

EXAMPLE 9

It is agreed within the federation that its member companies provide the federation with information about their sales volumes on a monthly basis for the purpose of reviews concerning market conditions and future business cycles. The federation collects the data and provides all the companies participating in the market review with company-specific statistics during the following month. This makes it easier to detect any transfers of customers.

➥ The compilation of data on company-specific sales volumes on a monthly basis is regarded as prohibited exchange of information.

EXAMPLE 10

The federation compiles company-specific information for statistics at an interval of a few months. The statistics are submitted to participants in a discussion on market development within an industry organisation. Although the names of companies have been removed from the material, it is easy for people familiar with the sector to recognise matters concerning individual companies in the statistics.

➥ This is a case of prohibited exchange of information.

2.6 How should the cartel prohibition be taken into account at meetings?

An agenda must be prepared in advance for all meetings held by EK and its member associations. Only permitted topics can be included in the agenda. The discussion at the meeting should be limited to the topics included in the agenda. Minutes must always be kept of meetings in which the progress of the meeting and the topics discussed, as well as those present, are documented clearly. If someone leaves the meeting before it ends, their name and the time must be recorded in the minutes. Misleading expressions must not be used in the minutes that may cause unnecessary suspicions concerning compliance with competition law.

Guidelines concerning agendas

- An agenda must be prepared for all meetings held by EK.
- The agenda must not include prohibited topics (see Section 2.4).
- The discussion at the meeting must be limited to the items specified on the agenda.
- If other matters are discussed at the meeting, it must be ensured that the discussion does not involve forbidden topics.

Discussion on a forbidden topic

- If a forbidden topic is discussed at a meeting, the speaker must be interrupted immediately, and they must be informed that the matter cannot be discussed because of rules related to competition law. Such a discussion must be stopped immediately. The chair of the meeting and all participants have an obligation to intervene in the situation.

Informal situations

- It is important to keep in mind that competition rules must be followed in both formal and informal contexts. In connection with a meeting, the participants often engage in informal conversations during coffee breaks, lunch or dinner. Prohibited topics must not be discussed in these conversations.

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One of the members of an industry organisation says at a meeting that all its members should maintain a certain minimum price level, because the aggressive pricing model of a member has caused trouble for the entire sector.

➥ This discussion violates the cartel prohibition. The members of an industry organisation must not discuss pricing or boycott a company involved in “aggressive pricing”. If you are present at such a meeting, interrupt the speaker immediately and let them know that the matter cannot be discussed due to the rules of competition law.

2.7 Are there are exceptions to the cartel prohibition?

In competition law, situations are examined case by case, taking into account the special characteristics of each sector. Whether a procedure is permitted or prohibited may ultimately depend on the actual impacts that it may have on the market. Even if a procedure falls within the scope of the cartel prohibition, it may be permitted based on an exemption provision if its benefits for consumers are greater than its adverse impact on competition.

For an exception to apply, the following four statutory requirements must be met:

1. The procedure must generate efficiency benefits or promote technical economic development.
2. A reasonable portion of the benefits must be transferred to consumers.
3. The cooperation must not continue for longer than is necessary to achieve efficiency benefits.
4. Competition in the sector must not be eliminated completely or to a significant degree.

It must be possible to demonstrate compliance with the criteria reliably and in detail (e.g. accurate calculations). It is recommended that a careful assessment of compliance with the criteria should be carried out in writing before engaging in the planned procedure. It may be difficult to demonstrate with sufficient certainty that the criteria for the exemption provision have been met. In practice, the exemption provision never applies to serious competition restrictions, such as price cartels.

If you are planning a procedure that you consider to fall within the scope of the cartel prohibition, but that may be permitted under an exemption provision, discuss the matter with a lawyer first.

EXAMPLE 12

An industry organisation recommends that its members should adopt a new practice in which subcontractors invoice the customers directly instead of invoicing them through the main contractor. The criteria for an exception are believed to be met, because the arrangement seems to increase transparency and efficiency.

➥ Even if the recommendation increases efficiency, cooperation is not permitted if similar efficiency benefits can be achieved through measures that have a less restrictive impact on competition. Since every company can make such a decision independently, cooperation is not considered necessary. If it has not been proved that all the four criteria for an exception are applicable, a recommendation must not be issued.

3 PROHIBITION ON ABUSE OF A DOMINANT MARKET POSITION

3.1 When does a company or an industry organisation hold a dominant market position?

A dominant market position means that a company has such a strong position in the market that it can prevent effective competition and operate in a manner that is independent of its competitors, customers and suppliers. In some cases, a market share of more than 40% has been considered to indicate a dominant market position. However, such a position is always identified case by case, taking into account the special characteristics of each sector, meaning that the limit can be lower or higher in individual cases.

An industry organisation may have such a strong position in the market that it is considered to hold a dominant market position. This could be the case, for example, with an industry organisation that is the only operator in its field providing licences or certificates that are necessary for companies to operate in the sector. However, it is more typical for an individual company than it is for an alliance of companies or an industry organisation to have a dominant market position. Competition legislation prohibits the abuse of a dominant market position, and not such a position in itself.

3.2 What does abuse of a dominant market position mean?

Abuse of a dominant market position includes, in particular, the following:

- Imposing unreasonable purchase or sales prices or other unreasonable conditions of sale directly or indirectly
- Restricting production, the market or technological development to the detriment of consumers
- Applying different terms and conditions to similar performances by different trade partners in a manner that renders partners in a disadvantageous competitive position
- Requiring that a contracting party accepts, as a prerequisite for an agreement, additional performances that are not connected to the subject of the agreement due to their nature or in terms of trading practice.

The list is not comprehensive. It provides an overview of measures that are prohibited when a company has a dominant position in the market.

Competition in the market is considered to have been restricted due to the dominant market position alone. A dominant company therefore has a particular responsibility to

act in such a way that competition in the market is not further reduced, prevented or restricted due to its conduct.

An industry organisation with a dominant market position is guilty of abuse if it, for example:

- Groundlessly refuses to enter into a business relationship with, for example, a company entering the market from abroad (in which case the member companies participating in the same procedure are guilty of a collective boycott, which is a violation of the cartel prohibition)
- Does not accept new members on equal and non-discriminatory terms
- Groundlessly discriminates against certain customers (e.g. non-members) when selling services

A company with a dominant market position must be particularly careful in terms of how its operations affect its suppliers, customers and competitors. The competition authorities have taken a very critical approach to measures implemented by companies with a dominant market position that may exclude some operators from the market.

An industry organisation **must not** engage in procedures that:

- Make it more difficult for some companies to participate in competition
- Seem to be targeted at a specific competitor of its members or a new company (e.g. a foreign company) that has entered the market

EXAMPLE 13

A company offers certain products and related services. The company has a dominant market position in the manufacture of the products in question, but it has a large number of competitors in services. In response to the competition, the company combines product sales with service provision and no longer sells products separately.

➥ The company abuses its dominant market position by combining the sale of products and services.

4 POWERS OF THE AUTHORITIEST

4.1 Competition authorities

The Finnish Competition and Consumer Authority (FCCA) is the authority that investigates competition restrictions in accordance with the Finnish legislation. The FCCA and the European Commission are the authorities that investigate competition restrictions in accordance with the rules of the European Union. The Regional State Administrative Agencies also carry out official duties related to competition matters in Finland.

The FCCA may start an investigation on its own initiative or based on a report submitted by any party. For example, companies' customers, suppliers or former employees may contact the FCCA on matters related to competition.

4.2 Investigative powers of the authorities

The competition authorities have extensive investigatory powers. These powers are not just theoretical – the competition authorities have used them continuously and continue to do so. Their powers include, for example:

- The right of access to the facilities of an industry organisation or company under inspection.
- The right to carry out unannounced inspections in companies' facilities, with help from the police if necessary.
- The right to search for documents, correspondence (e.g. emails, text messages, WhatsApp messages and other social media channel content) and recordings, and to hear the company's employees.
- The right to conduct house searches in employees' homes or holiday homes, for example, with permission from the Market Court

EXAMPLE 14

The FCCA has received a report on a suspected competition restriction in a specific industry. To investigate the case, the FCCA decides to carry out an unannounced inspection of the industry organisation's facilities. One morning, FCCA employees arrive in the lobby of the industry organisation's building and request access to employees' offices. The authorities are going to search for documents related to competition restrictions and review emails.

➥ The FCCA has the right to conduct an inspection and review documents and emails. The employees at the industry organisation's reception desk must be provided with instructions for such situations in advance.

5 PROCEDURAL VIOLATIONS AND THEIR CONSEQUENCES

5.1 What are procedural violations and what are their possible consequences?

Fines can be imposed on companies or alliances, such as industry organisations, not only for competition restrictions, but also for violations of procedural rules in accordance with competition legislation. The following are examples of such violations:

- Resisting or preventing an official inspection
- Breaking a seal placed in connection with an investigation of the competition restriction
- Providing the authorities with inaccurate, misleading or incomplete information
- Failing to provide the requested information or material
- Failing to attend a hearing
- Failing to comply with a decision concerning a violation or a commitment, or a temporary order

The imposition of a fine for a procedural violation requires intent or negligence. Lack of awareness of procedural violations leading to fines is not grounds for exemption. Fines are determined by the Market Court at the competition authorities' proposition. Their amount is up to 1% of the company's global net sales during the financial year preceding the proposition. Fines for industry organisations are based on the combined net sales of the member companies, meaning that the amounts can be substantial. The authorities can also impose conditional fines.

5.2 Separate guidelines on conduct during official inspections

Industry organisations and their member companies must pay special attention to their conduct during investigations carried out by the authorities. **EK has prepared separate guidelines for such situations**. The guidelines have been translated into English. Industry organisations and companies must ensure that the reports they submit to the competition authorities include all the information requested, and that the reports are submitted within the time limit provided.

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The authorities are conducting an inspection and request access to a locked cabinet in the office of the industry organisation's managing director, who is on holiday. The authorities also announce that the inspection of some offices is still in progress and will continue on the following day. The authorities are going to seal the doors to these offices for the night.

➥ The industry organisation must ensure that the door of the locked file cabinet can be opened for the official inspection. Everyone entering the facilities under inspection, including cleaners in the evening, must be instructed to not open the sealed doors or touch the seals.

6 HEARING AND RIGHTS OF DEFENCET

6.1 Suspects' rights

Right to be heard
Before a decision is made on a violation of competition law, the suspect must be offered an opportunity to be heard on the matter. They can express their view on the matter, answer questions posed by the authorities and provide information that may have an impact on the assessment of the matter. In practice, the FCCA provides the parties involved in a suspected violation with a draft proposal or decision in advance to comment on.

Suspects' right to not testify against themselves
During competition investigations, representatives of the company or organisation have the right to not answer any questions that would require the admission of guilt (e.g. "Did you participate in a cartel?"). However, they must answer all factual questions (e.g. "Did you attend the meeting held on 26 March 2016?" or "What was discussed there?").

6.2 Access to documents

Documents containing business secrets
According to the Finnish Act on the Openness of Government Activities, official documents are generally public. This also applies to documents accumulated during competition investigations. However, companies and organisations may – and should – demand that the business secrets they disclose to the authorities are kept confidential. On the other hand, the parties involved have more extensive access rights to information than the public. For this reason, the companies or industry organisations involved in the case may also demand access to documents containing other parties' business secrets. However, such access can be required only to the extent that the information may have affected the authorities' discretion in the matter.

Access to documents is not granted if the disclosure of information may jeopardise an investigation in progress. This ensures that the authorities can conduct the investigation uninterrupted.

Documents prepared by lawyers (legal privilege)
Communication between a lawyer and their client is confidential. The competition authorities do not need to be provided with documents drawn up by a lawyer or correspondence or other communication between the lawyer and their client. Such documents should be marked with the words "Legal privilege". It is good to keep in mind that this rule only applies to a lawyer or other external legal advisor. It does not apply to legal experts working for the company or organisation.

7 CONSEQUENCES OF VIOLATIONS OF COMPETITION LAW

Violations of competition law may lead to legal and other consequences. The consequences can have extensive long-term impacts on the operations of the company or industry organisation. It is important to remember that **lack of awareness of the rules does not make the procedure any less illegal.** Lack of awareness is not grounds for reduced consequences or exemption.

7.1 Legal consequences

- **Bans and conditional fines**
  The competition authorities may order the prohibited operations to be discontinued and may impose a conditional fine to ensure compliance with the ban. A conditional fine may also be imposed if the company fails to provide the authorities with the requested information or attempts to prevent an official inspection.

- **Obligation to act**
  The competition authorities may require the company to actively implement measures to remedy the situation that has a harmful impact on competition by obligating the company to enter into a business relationship with a specific party, for example.

- **Invalidity**
  Violations of competition rules may lead to significant fines. The fine can be up to 10% of the global net sales of the group of companies to which the company belongs.

- **Fines**
  Kilpailusääntöjen rikkomisen seurauksena voi olla huomattava seuraamusmaksu. Se voi olla jopa 10 prosenttia kilpailulainsäädäntöä rikkoneen yrityksen koko konsernin maailmanlaajuisesta kokonaisliikevaihdosta.

- **Criminal liability**
  In Finland, no penal sanctions are imposed for violations of competition legislation. However, providing the investigating authority with incorrect information is a criminal offence in Finland. In addition, the conduct of a bidding cartel may constitute fraud in certain circumstances. Many countries within and outside the EU impose penal sanctions for competition restrictions. Penalties can be imposed in countries whose markets may be affected by the competition restrictions in question.

- **Damages**
  A party adversely affected by a competition restriction is entitled to claim compensation for any direct or indirect losses they have incurred.

- **Exclusion from public procurement**
  Under the Act on Public Procurement and Concession Contracts (1397/2016), a company that has violated competition law may be excluded from public invitations to tender. This may cause significant harm to its business. The use of a competition breach as a discretionary criterion for exclusion has increased in recent years.

7.2 Negative publicity and harm caused by investigations

Violations of competition law often attract negative publicity. They also often lead to a long process that ties up the company's or industry organisation's resources to a great extent. Fines proposed by the FCCA usually attract a great deal of attention and cause concern and harmful reactions among the company's or industry organisation's stakeholders, such as customers, members, employees and partners.

Negative publicity during the process may cause significant harm to the operating conditions of the company or industry organisation over many years. This may happen, even if the result of the process eventually turns out to be positive. The final decision is not necessarily reported as extensively by the media as the suspected competition breach. The reputation damage caused by negative publicity to the parties and people involved in the process should not be underestimated.

8 STRUCTURAL CORRECTIVE MEASURES

8.1 What are structural corrective measures?

The amendments to the Competition Act that entered into force on 24 June 2021 also included a provision concerning corrective measures. According to the provision, a company or an alliance of companies that violates or has violated the cartel prohibition under national legislation is guilty of abusing a dominant market position or has violated the provisions of Articles 101 or 102 of the Treaty on the Functioning of the European Union may be ordered to make changes, even substantial ones, to its business operations.

These may include, for example:

- Divesting a holding in a competing company
- Divesting a specific business unit
- Other structural measures that are proportionate to the violation of competition rules and necessary to put an end to the infringement.

8.2 When can structural corrective measures be imposed?

Structural corrective measures can be imposed only when other corrective measures concerning the operations of the company or industry organisation are deemed insufficient or when an operational corrective measure is more burdensome for the company than a structural corrective measure. According to the Competition Act, a structural corrective measure must not lead to loss of the operating capacity of the company's remaining economic activities. The Market Court imposes structural corrective measures on the proposal of the FCCA.

9 MORE INFORMATION AND LINKS

Legislation

- Competition Act (948/2011)
- Treaty on the Functioning of the European Union (TFEU)
- Act on Antitrust Damages Actions (1077/2016)
- Act on Public Procurement and Concession Contracts (1397/2016)

Links

- https://www.kkv.fi/en/competition-affairs/
- www.markkinaoikeus.fi/fi/index/paatokset/kilpailu-javalvonta-asiat.html
- http://ec.europa.eu/competition/index_en.html

Case law

Prohibited cooperation

- Bus cartel, KHO:2019:98, 20 August 2019
- Cartel in the market for household appliance maintenance services, KHO:2013:8, 22 January 2013
- Cartel in the market for spare parts for cars, KHO:2012:T1429, 31 May 2012
- Asphalt cartel, KHO:200 83, 29 September 2009

Recommendations by industry organisations

- Price recommendations by the Finnish Bakery Association, KHO:2019:T3713, 20 August 2019
- Finnish Hairdressers Association's member bulletins, 2013:T1993, 14 June 2013

Statistics and exchange of information

- Exchange of information in the grocery market, decision of the Finnish Competition Authority on 19 June 2008, No. 154/61/2007
- Exchange of information in the roofing felt market, decision of the Finnish Competition Authority on 16 February 2007, No. 1011/61/2002
- Grocery trade store register, decision of the Finnish Competition Authority on 23 February 2004, No. 253/61/1999
- Finnish Producers of Sound and Image Recordings (ÄKT), decision of the Finnish Competition Authority on 23 March 2004, No. 740/61/2002

Abuse of a dominant market position

- Valio, predatory pricing, KHO:2016:221, 29 December 2016

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