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**THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES -  
Contribution from Finland**

**- Session III -**

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This contribution is submitted by Finland under Session III of the Global Forum on Competition to be held on 6-8 December 2021.

More documentation related to this discussion can be found at: [oe.cd/pcnca](https://oe.cd/pcnca).

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## *The Promotion of Competitive Neutrality by Competition Authorities*

### **– Contribution from Finland –**

#### **1. The FCCA's supervising authority in the Competition Act**

1. The Finnish Competition Act<sup>1</sup> (948/2011) applies to activity by undertakings. According to section 4 an undertaking in the context of the Competition Act shall mean a natural person, as well as one or more private or public legal persons, who engage in economic activity. According to the legislative materials a public entity can be an undertaking in the meaning of the Competition Act when it exercises economic activity in the meaning of the Act<sup>2</sup>. The concept of economic activity is determined by the Competition Law of the European Union (EU) and interpreted through EU case law. The legislative materials of the competitive neutrality provisions of the Competition Act also refer to the Commission's SGEI Communication<sup>3</sup> as an aid for interpretation of the distinction between economic and non-economic activities.<sup>4</sup>

2. The Competition Act contains certain provisions with the explicit objective of ensuring competitive neutrality. These provisions are found in chapter 4a on securing neutral competitive conditions between public and private sector undertakings, which entered into force in 2013. In section 30a the Finnish Competition and Consumer Authority (hereinafter referred to as the FCCA) is granted the authority to intervene – with legally mandated requirements and restrictions – in the provision of goods and services in public sector business activities, if a business practice (such as pricing below cost) or organisational structure (such as undertakings controlled by the public sector) prevents or distorts competition on the market or is in contrast with the requirement of market-based pricing in the Local Government Act.

3. According to the provisions the FCCA shall as its primary method strive to abolish the distortion of competition through negotiations. If the desired results are not achieved through negotiations, the FCCA shall prohibit the use of the business practice or organisational structure or impose such conditions on the continuance of the practice or operations, which ensure neutral competitive conditions on the market. The FCCA may enforce its order, conditions, prohibition or obligation by imposing a periodic penalty payment. Thus far the FCCA has not used these stricter measures. Public sector entities have in general been willing to cooperate and find solutions through negotiations, when concerns related to their operations have been brought to their knowledge.

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<sup>1</sup> An unofficial English translation of the Competition Act is available at <https://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/competition-act/>

<sup>2</sup> Government proposal 40/2013, p. 5. Available in Finnish and Swedish at <https://www.finlex.fi/fi/esitykset/he/2013/20130040>.

<sup>3</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C 8/02).

<sup>4</sup> Government proposal 40/2013, p. 31.

4. In 2020 an additional provision requiring accounting separation of the economic activity carried out in a competitive market environment entered into force. The provision concerns situations in which the public entity engages both in economic activity in a competitive market environment and in other activity. The aim of the provision is to ensure the transparency of business activities carried out by public entities. The provision enhances the supervision of competitive neutrality as the FCCA is provided with reliable data based on accounting. The FCCA gets access to accounting material through which it is possible to assess the volume and profitability of public entities' economic activity in a competitive market environment.<sup>5</sup>

5. The FCCA is an independent and unaffiliated authority. In its supervision the FCCA is free of industrial policy considerations. The FCCA's jurisdiction in competitive neutrality issues is further not limited to any particular type of distortion. The FCCA may intervene in any operation that distorts or prevents competition regardless of its form. For the competence of the FCCA it is critical that the public entity under scrutiny exercises an economic activity. Intervention requires the existence of negative impacts on the functioning of competition.

6. Since the establishment of the FCCA's supervisory role in relation to competitive neutrality, the authority has scrutinized various forms of suspected distortions in versatile industries. The FCCA's competitive neutrality decisions relate, inter alia, to waste management, occupational health services, municipal catering and cleaning services as well as laboratory services. While the FCCA has not explicitly chosen specific industries for analysis some of the investigations have had a wider scope, with alleged infringements by several public entities in the same industry brought to the attention of the FCCA via requests for action. This was the case in investigations on occupational health services and laboratory services within environmental health. Remedies adopted following the FCCA's scrutinies and negotiations have included e.g. incorporation of the economic activity and changing from cost-based pricing to market-based pricing.

7. The FCCA's power to intervene in situations endangering competitive neutrality is restricted when the operating model or structure is based on legislation. The authority does not have competence to intervene if the business practice or organizational structure follows immediately from legislation or if the intervention would prevent the performance of a major obligation related to citizens' welfare, security or other such common interest. The authority may not order an activity to be discontinued if the performance of the activity is based on legislation.

8. The FCCA further does not have the authority to supervise the granting of state aid or the establishing of services of general economic interest (SGEI), which fall within the exclusive jurisdiction of the Commission of the European Union. Questions related to prevention or distortion of competition may nevertheless arise in the context of state aid and SGEI-services and the FCCA may intervene e.g. in situations where a SGEI-service is overcompensated.<sup>6</sup>

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<sup>5</sup> Government proposal 68/2018, p. 53. Available in Finnish and Swedish at <https://finlex.fi/fi/esitykset/he/2018/20180068>.

<sup>6</sup> Government proposal 40/2013, p. 26.

## 2. Specific provisions in the Local Government Act

9. Chapter 15 of the Local Government Act (410/2015)<sup>7</sup> contains provisions on municipal activities in a market environment. Section 126 establishes an incorporation obligation according to which, whenever a municipality carries out its functions in a competitive market environment, it must assign these to a limited liability company, cooperative, association or foundation to perform. The same section also provides several examples on situations when the municipality is not considered to be carrying out its function in a competitive market environment. This is the case e.g. when the municipality is providing, by law, services that form part of its own activities for the municipality's residents and for others for whom the municipality is required by law to arrange services. Another example is if the function is being carried out through cooperation in the manner referred to in section 49 of the same act on the basis of a cooperation obligation laid down by law, and the services are provided as the municipality's own services for the area's residents and for others for whom the services are required to be arranged by law. Further if the activities are based on the status of statutory monopoly or constitute a natural monopoly or provide services directly related to these, it is not considered as carrying out a function in a competitive market environment.

10. The same section also stipulates that a municipality is operating in a competitive market environment if it takes part in an invitation to tender, unless it is an invitation to tender for arranging education services or certain other related tasks.

11. Section 127 exempts certain activities from the incorporation obligation, e.g. activities that are seen as minor in nature or support services provided by the municipality to its subsidiaries. When the municipality operates in a competitive market environment in these situations section 128 requires that it adopts market-based pricing for the activities. Market-based pricing refers to the price level at which a corresponding private operator would price its services. Pricing must accordingly allow for the variable and fixed costs of competitive operations, revenues, investment costs, financing costs, and a reasonable return on capital employed. Fixed costs, investment costs and financial costs must be taken into account in proportion to the share of operations performed in a competitive market.<sup>8</sup>

12. The chapter further contains sections on granting a loan or guarantee or other security by a municipality, disposal of real estate owned by a municipality or specification of market-based leases and imposing a service obligation on a service provider operating in a competitive market environment.

13. Finally, the chapter refers to the Competition Act as laying down provisions on the right of the FCCA to intervene in procedures or operating structures of a municipality or joint municipal authority, or of a corporate entity within its control, that are in breach of the Competition Act.

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<sup>7</sup> An unofficial English translation of the Local Government Act is available at: <https://www.finlex.fi/en/laki/kaannokset/2015/20150410>

<sup>8</sup> Government proposal 32/2013, p. 38. Available in Finnish and Swedish at <https://www.finlex.fi/fi/esitykset/he/2013/20130032>.

### 3. Other means of promoting competitive neutrality

14. According to the legislative materials of the Competition Act<sup>9</sup> the FCCA does not have the power to intervene in breaches of competitive neutrality that follow immediately from law, when the intervention would require putting aside legislation. The FCCA thus does not have the competence to correct legislation, but where necessary the authority could make an initiative towards an amendment of the legislation. According to section 2 of the Act on the FCCA<sup>10</sup> (661/2012) the authority, along with its other tasks, prepares proposals and initiatives to promote competition and eliminate regulations and provisions that restrict competition as well as conducts research, studies and comparisons within its area of responsibility. Advocacy measures enable the FCCA to promote competition and competitive neutrality more broadly and in situations to which the supervisory competence does not extend.

15. The FCCA also promotes competitive neutrality by participating in the legislative process through working groups on the request of ministries. The FCCA also gives comments on draft government proposals following requests for comments.

16. Outside of its official scrutinies into specific cases, the FCCA also gives guidance on the requirements of competitive neutrality in the Competition Act.

17. Within the FCCA studies and industry analyses are mainly carried out by the advocacy and research unit. In these analyses competitive neutrality considerations may also be relevant in addition to the more general perspective of promoting competition. Specialists from the authority's competition neutrality supervision may also participate in the work. The authority also has a separate public procurement supervision, which may scrutinize public procurement procedures as well as carry out advocacy measures related to the public procurement framework. In 2015 the FCCA assessed how well municipalities had complied with the incorporation obligation based on the Local Government Act and in 2016 the fulfilment of the same requirement was investigated with regard to joint municipal authorities. The findings of both studies were similar. In both cases it appeared that there remained substantial activities that were not incorporation, even though they might fall within the sphere of the incorporation requirement. Both studies also revealed short-comings in the understanding of and adherence to the requirement of market-based pricing, which applies to certain exemptions from the incorporation obligation. Currently the FCCA is conducting a study on external sales of in-house entities, within which competitive neutrality considerations are also present. The aim of the study is to consider the risks and benefits related to in-house entities' external sales as well as the effects on market conditions from possible changes to the external sales limit. The FCCA is presently also conducting a survey to map municipalities' activities in a competitive market environment and adherence to the requirement of accounting separation.

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<sup>9</sup> Government proposal 40/2013, p. 24.

<sup>10</sup> Unofficial English translation available at <https://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/act-on-the-finnish-competition-and-consumer-authority/>