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**THE DEVELOPMENT OF EUROPEAN COMPETITION LAW
ENFORCEMENT SYSTEM: ANALYSIS OF THE ECN+
DIRECTIVE AND ITS IMPLEMENTATION IN FINLAND**

Bachelor's thesis

Programme HAJB08/17, specialisation in International Law and European Union Law

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Tallinn 2022

I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading. The document length is words from the introduction to the end of conclusion.

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LIST OF ABBREVIATIONS

ECJ European Court of Justice

ECN European Competition Network

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

EU European Union

European Commission the Commission

FCA Finnish Competition Authority

FCCA Finnish Competition and Consumer Authority

FMC Market Court of Finland

FSAC Supreme Administrative Court of Finland

GP Government Proposal

MS Member State

NCA National Competition Authority

Regulation 1/2003 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

Regulation 17/62 Council Regulation (EEC) No 17: First Regulation implementing Articles 85 and 86 of the Treaty

TFEU Treaty on the Functioning of the European Union

ABSTRACT

Effective enforcement of competition law in the European Union (EU) is significant for operating a fair and open market within the Union in which undertakings compete objectively on their own merits and without barriers to competition created by undertakings. In the EU, the effective enforcement of competition law is achieved through the decentralized enforcement system established by Regulation 1/2003. In the decentralized enforcement system, compliance with the EU competition rules is publicly enforced by the Commission and national competition authorities (NCAs). However, Regulation 1/2003 did not provide adequate controls on guarantees of the independence, resources, and enforcing and fining powers of the NCAs to enforce competition law effectively. The ECN+ Directive harmonizes the regulation of these aspects to improve the enforcement capacity of NCAs and ensure the proper functioning of the internal market.

To analyse the implementation of the ECN+ Directive, the thesis concentrates on the role and function of the NCAs. The key research question is whether and how the implementation model of the ECN+ Directive in Finland can contribute to the objective of the ECN+ Directive and thus impact the enforcement of competition rules. To answer the research question, the thesis generally analyses the development of the EU competition law enforcement system and the increased role of NCAs. Secondly, the thesis specializes in the Finnish competition law system and the operations of the Finnish Competition and Consumer Authority. Based on the analysis, the thesis presents proposals to further improve the competition law enforcement system, specifically in Finland.

Keywords: EU competition law, competition law enforcement, effective enforcement, Article 101 TFEU, Article 102 TFEU, ECN+ Directive, legal certainty

INTRODUCTION

The thesis analyses the development of the European competition law enforcement system and implementation of the Directive (EU) 2019/1¹ (ECN+ Directive) in Finland. The ECN+ Directive was adopted on the 11th of December 2018, and Member States (MSs) were obliged to implement it by the 4th of February 2021. Finland adopted the provisions of the ECN+ Directive to its national legislation on the 18th of June 2021.² The ECN+ Directive aims to strengthen the EU competition law system, in particular the enforcement of Articles 101 and 102 of the Treaty on the Functioning of European Union (TFEU), by enhancing the powers of national competition authorities (NCAs) in an effective and consistent manner alongside with the European Commission (the Commission). The ECN+ Directive sets the policy objective to reinforce the enforcement of EU competition law by empowering NCAs. However, it leaves it to the MSs to adopt necessary implementing measures. The thesis examines Finland's strategy for achieving the objective of the ECN+ Directive, primarily focusing on the provisions relating to the NCAs and the powers and fining powers of the Finnish Competition and Consumer Authority (the FCCA).

To understand the ultimate idea behind the ECN+ Directive, it is necessary to understand the history and development of the European competition law enforcement system. In addition to the development of competition law enforcement at the European level, each MS has had its own national development of competition law enforcement system, detached from the EU. National characteristics and procedures of the MSs' national legal systems have influenced the way how the enforcement of competition law and functioning of NCAs has developed in each MS. This has led to significant differences between MSs. Examining the implementation process and success of the ECN+ Directive at the whole EU level would require a closer look at each MSs' previous competition policies and legislation. This certainly exceeds the scope of a bachelor-level thesis - therefore, the research scope is narrowed to Finland.

To analyse the implementation of the ECN+ Directive, the thesis concentrates on the role and function of the NCAs. The key research question is whether and how the implementation model of the ECN+ Directive in Finland can contribute to the objective of the ECN+ Directive and thus

1 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. (Text with EEA relevance) (OJ L 11, 14.1.2019).

2 Laki kilpailulain muuttamisesta 18.06.2021/546.

impact the enforcement of competition rules. In answering this key research question, this thesis will assess: a) the underlying reasons why Finland has selected concerned the legislative solutions to comply with the ECN+ Directive; b) how and to what extent the fundamental principles, principally legal certainty, are guaranteed in the Finnish competition law system to balance the increased powers of the FCCA; and c) what are the benefits and disadvantages for enforcement of the competition law of Finland – is the objective of European competition law achieved despite the disadvantages? The research method of the thesis is legal-dogmatic research and analysis of the EU competition law system and Finnish competition law system. The thesis analyses explicitly the laws, policies, and relevant case law, particularly on the Council Regulation 1/2003 and ECN+ Directive. The scope of the thesis is limited to the analysis of the effects of the ECN+ Directive on the activities of NCAs and, specifically, of the FCCA. Analysis of the indirect impact of the ECN+ Directive on the activities of the Commission is excluded from the scope of the thesis.

The thesis is organized according to the following structure to answer the research questions. Following the introduction, the first chapter demonstrates the content and significance of Articles 101 and 102 TFEU and provides a brief overview of the history and current state of the competition law enforcement system in the EU. The second chapter reviews the development and role of NCAs in parallel with the Commission and analyses the essential improvements influenced by the ECN+ Directive. The third chapter analyses the competition law enforcement system and implementation process of the ECN+ Directive in Finland and the following amendments to Finnish competition law, particularly regarding fines and powers of the FCCA. Based on the analysis of the competition law enforcement system and implementation solutions in Finland, the thesis will evaluate whether the primary objective of the ECN+ Directive – to unify the nature and mechanisms of NCAs to a sufficient level union-wide – has materialized? The thesis also determines whether the Finnish competition law enforcement system converged with the EU and any new legal concerns emerged.

1. EU COMPETITION LAW ENFORCEMENT

EU competition policy aims to improve the proper functioning of the internal market by removing measures that distort or restrict competition between undertakings or associations of undertakings (associations). The primary objective of EU competition law is to optimize efficiency to maximize consumer welfare, protect consumers and smaller undertakings from the abuse of economic power of more prominent actors on the market, and further an integrated internal market.³ There does not exist a universal definition or a legal definition for consumer welfare⁴, but in general, it relates to the fact that consumers benefit from the proportionate and fair supply, prices, and quality of products and services.⁵ However, some undertakings may jeopardize or impede effective competition through different anti-competitive agreements and arrangements or by abusing their dominant market position to gain unfair financial benefit.

The chapter focuses on the analysis of the key provisions of the TFEU on competition and specifically their enforcement from the perspective of the division and transformation of enforcement tasks of the Commission and the NCAs. Firstly, the chapter outlines the relevant TFEU articles and why effective enforcement of the articles is significant for the EU competition system and internal market. Secondly, the chapter provides a historical overview of the development of the EU competition law enforcement system by describing the shift from a centralized to a decentralized competition law enforcement system.

The progression presented in the chapter has taken place primarily to enable the effective enforcement of competition law. The principle of effectiveness is one of the fundamental principles of the EU, which guarantees the direct effect of EU law and the primacy of EU law at a national level. It has developed in the case law of the European Court of Justice (ECJ) and has later been codified into the EU legislation.⁶ Effective enforcement of Articles 101 and 102 and reducing restrictions on competition at the EU level improve the proper functioning of the internal market

3 European Court of Auditors. (2020) *Special Report: The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight*. No: 4, 9. Retrieved from: <https://op.europa.eu/webpub/eca/special-reports/eu-competition-24-2020/en/>. 20 February 2022.

4 Daskalova, V. (2015). Consumer welfare in EU competition law: what is it (not) about? *The Competition Law Review* (2015), 11(1), 132.

5 Claassen, R., Gerbrandy, A. (2016). Rethinking European competition law: from a consumer welfare to a capability approach. *Utrecht Law Review*, 12(1), 2.

6 Mendez-Pinedo, M. E. (2021). The principle of effectiveness of EU law: a difficult concept in legal scholarship. *Juridical Trib.*, 11, 5. 9–16.

as a whole. Regarding competition law, the principle of effectiveness imposes several procedural requirements on MSs, such as requirements for the proceedings of NCAs. However, the principle of effectiveness is limited by other fundamental principles of the EU, of which the thesis particularly concentrates on the principle of legal certainty. Legal certainty implies that authorities' decisions must be predictable and acceptable – decisions can not be based on arbitrary or unforeseeable jurisdiction and must comply with the values of the relevant legal culture.⁷ The ECJ interprets legal certainty in the light of the EU's objectives and other fundamental legal principles.⁸ In terms of competition law enforcement, therefore, in addition to the principle of effectiveness, it is essential to ensure that other legal principles are met to strike a balance. Hence, the enforcement of competition rules by the Commission and NCAs must be predictable and acceptable.

To understand the importance of an effective competition law enforcement system, it is necessary to recognize the principal benefits it contributes to the functioning of the internal market. Hence, the next sub-chapter begins with an analysis of the traditional rationale of the competition law system from the point of view of the objectives of the internal market.

1.1. Articles 101 and 102 TFEU

Undertakings may restrict or distort competition in two main ways: either by creating anti-competitive agreements or practices or abusing their dominant position. Articles 101 and 102 TFEU provide legal rules to address these common competition law distortions, which could potentially impede the efficiency of the internal market.⁹ Article 101 prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that prevent, restrict, or distort competition in the internal market, or may lead to the prevention, restriction, or distortion of competition in the internal market. However, under specific conditions set out in Article 101(3), incompatible decisions and agreements may be permitted for other efficiency gains for the internal market. These efficiency gains include customer benefits from technical or economic progress. Article 102 prohibits the abuse of dominant position by one or more undertakings, which may affect trade within the internal market. TFEU does not provide derogations for infringing Article 102.

7 Raitio, J. (2019). Oikeusvaltioperiaate, oikeusvarmuus ja koherenssi Euroopan unionin kilpailuoikeudessa. *Defensor Legis: Suomen asianajajaliiton äänenkannattaja*. 62–64.

8 *Ibid.*, 63.

9 Jones, A., Sufrin, B. (2014). *EU Competition Law* (5th ed.). New York, USA: Oxford University Press. 114.

One of the fundamental economic objectives of the EU is to allocate resources optimally by granting the factors of production to locate in the area where they are most valued.¹⁰ According to the traditional economic theory, “goods and services are produced most efficiently where there is perfect competition, or more realistically, workable competition.”¹¹ The ultimate objective of the European competition law is to support the goals of the EU by enhancing efficiency in the sense of maximizing consumer welfare and allocating resources optimally.¹² The role of competition law as an instrument to protect the unification of a more extensive system – the functioning of the internal market¹³ – is a feature that distinguishes the EU competition law regime from any other competition law regime in the world.¹⁴

For those reasons, in addition to the articles related to the EU internal market, the provisions on competition have been fundamental for the development of the EU law. Provisions securing competition were included already in the founding Treaty of Rome in 1957.¹⁵ The working paper of the Treaty of Rome emphasized the need to eliminate measures that alter or create unfair competition to allow the common market's normal functioning. Without these measures, competition will work naturally, and production will be concentrated where it is most effective.¹⁶ The relevant competition law provisions in the Treaties have remained approximately the same throughout their existence¹⁷ from the Treaty of Rome to the present day.¹⁸ The Articles 101 and 102 TFEU are written in rather broad and simple terms to cover a wide scope for what is considered an infringement.¹⁹ Thereupon, the threshold for detecting competition law infringements has been low to ensure the functioning of the internal market.²⁰

10 Craig, P., De Burca, G. (2020). *EU Law: Text, Cases, and Materials*. (7th ed.) New York, USA: Oxford University Press. 642.

11 *Ibid.*, 1034.

12 Jones, A., Sufrin, B (2014), *supra nota* 9, 34-35, 39.

13 The ultimate idea behind the internal market is that goods, persons, services, and capital move freely. EU internal market law aims to remove obstacles between MSs to support freedom of movement by, for example, removing tariffs. Competition law complements this objective of the internal market by addressing the behaviour of actors in the market.

14 Jones, A., Sufrin, B (2014), *supra nota* 9, 39.

15 Treaty Establishing the European Community, 25 March 1957.

16 Chiriță, A. D. (2014). A legal-historical review of the EU competition rules. *International & Comparative Law Quarterly*, 63(2), 289.

17 The former relevant provisions were included in Articles 85 and 86 of the Treaty of Rome. After the Maastricht Treaty, the provisions appeared in Articles 81 and 82.

18 Aalto-Setälä, I. (2015). EU:n kilpailunormien täytäntöönpanoasetuksen kymmenvuotistaival – mitä seuraavaksi? In: Mentula, A (Eds.), *Kilpailuoikeudellinen vuosikirja 2014* (105-118), Vantaa: Multiprint. 117.

19 Raitio, J. (2016). *Eurooppaoikeus ja sisämarkkinat*. Finland, Helsinki: Alma Talent. 699.

20 *Ibid.*, 699.

For instance, in the case *T-Mobile*²¹, major mobile telecommunications operators in the Netherlands held a meeting to exchange confidential price information. The purpose of the meeting was not to harm consumers, and the Court of Justice (ECJ) considered that the information exchange would not ultimately harm consumers financially.²² However, the ECJ recognized the meeting as concerted practice and regarded it as a restriction on competition.²³ As the Articles 101 and 102 TFEU do not exhaustively clarify which conduct is considered anti-competitive, it has been up to case law to shape the application of competition rules to its current level.

The essence and the rationale of what is now Article 101 and 102 TFEU have not changed since the Treaty of Rome – however, the procedure to make those provisions efficient and actionable to avoid infringements has been substantially modified.²⁴ The following sub-chapter analyses this historical transformation and explains the major conceptual shift from a centralized to a decentralized system of enforcement of Articles 101 and 102 TFEU.

1.2. Development of the enforcement system of EU competition law: three main historical stages

1.2.1. Stage 1: Regulation 17/62 – a centralized system of enforcement

In order to provide “a system ensuring that competition shall not be distorted in the common market and a balanced application of Articles 101 and 102 TFEU in a uniform manner”²⁵, Regulation 17/62 was adopted. Regulation 17/62 created the centralized so-called notification and authorization enforcement system where the Commission was responsible for enforcing Articles²⁶ 101 and 102 TFEU.²⁷ Regulation 17/62 granted a central application and enforcement role to the Commission, leaving the functions of the NCAs minor.²⁸ Commission was the only empowered authority to apply the exception on efficiency gains provided in Article 101(3) TFEU in competition cases. The centralized enforcement system functioned in a way that undertakings were

21 Judgement of the Court (Third Chamber) of 4 June 2009, *T-Mobile*, C-8/08, EU:C:2009:343.

22 *Ibid.*, point 43.

23 *Ibid.*, point 62.

24 Chiriță, A. D. (2014), *supra nota* 16, 315-316.

25 Council Regulation (EEC) No 17 of 6 February 1962, First Regulation Implementing Article 85 and 86 of the Treaty, OJ 13, 21.2.1962, 204–2011.

26 At the time, the Articles 85 and 86 of the Rome Treaty.

27 European Commission, Directorate-General for Competition (2012). *Report on the functioning of Regulation 1/2003: Communication from the Commission to the European Parliament and the Council COM (2009) 206 final*, Publications Office. 3.

28 Jones, A., Sufrin, B. (2011). *EU Competition Law: Texts, Cases and Materials*. (4th ed.). Oxford, United Kingdom. Oxford University Press. 1027.

obliged to directly notify the Commission of all practices and agreements prohibited under Article 101(1). The Commission then assessed whether there was an infringement in hand or whether the conditions of Article 101(3) were met and, if so, granted a negative clearance or an exemption to the undertaking.²⁹ If an undertaking had violated the rules covered by either Article 101 or 102 TFEU, the Commission had the right to terminate the infringement and impose fines. The tasks of the NCAs in the EU competition law enforcement primarily concentrated on supporting the Commission's operations.³⁰

Considering that the EU at the time Regulation 17/62 was adopted only included 6 MSs³¹, a centralized system was a reasonable and workable solution. The number of MSs and their competent and independent NCAs was considerably smaller, and European competition law had not developed to the same scale as it is now.³² Therefore, allocating enforcement powers to the Commission was effective and satisfactory. However, as the EU has constantly evolved with new MSs and more cross-border movement³³, the administrative burden caused by the centralized system eventually led to an overload of the Commission³⁴ and problems in the functioning of the arrangements in practice.³⁵

1.2.2. Stage 2: Council Regulation 1/2003 - a major conceptual shift from a centralized to a decentralized system of enforcement

The gradual geographical and substantive growth of the EU necessitated the reform of the procedural rules and the enforcement system of the competition law. Regulation 17/62 was repealed in 2002, and Regulation 1/2003 entered into force in 2004.³⁶ When Regulation 1/2003 entered into force, the enforcement system shifted from centralized to decentralized, meaning that the Commission was no longer the only enforcer of Articles 101 and 102 TFEU.³⁷ Hence, NCAs gained eligibility in the enforcement of Articles 101 and 102 TFEU.³⁸ The derogation provided by

29 Regulation 17/62, art. 1-4.

30 Jones, A., Sufrin, B (2014), *supra nota* 9, 923-925.

31 European Commission. *From 6 to 27 members*. Retrieved from: https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/6-27-members_en, 25 February 2022.

32 Cengiz, F. (2016). An academic view on the role and powers of National Competition Authorities: background to the ECN plus project. *European Parliament Study IP*. A/ECON/2016-06. 6.

33 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 83 of the Treaty. OJ L 1, 4.1.2003, p. 1–25. recitals 1 and 3.

34 Montag, F., & Rosenfeld, A. (2003). A Solution to the Problems? Regulation 1/2003 and the modernization of competition procedure. *Zeitschrift für Wettbewerbsrecht*, 1(2), 108-110.

35 See for example Case JBC Service v Commission T-67/01.

36 Regulation 1/2003.

37 Jones, A., Sufrin, B (2011), *supra nota* 28, 923-925.

38 Wils, W. P. (2019). Independence of Competition Authorities: The Example of the EU and its Member States. *World Competition*, 42(2), 3-4.

Article 101(3) became directly applicable, and all enforcers of EU competition law were granted the right and obligation to apply Articles 101 and 102 to all agreements and procedures that may affect trade between the MSs.³¹ This was a groundbreaking turning point in the European competition law system.

Simultaneously as Regulation 1/2003 was adopted, the Network of European Competition (ECN) was founded.³⁹ The primary function of the ECN was to develop a regime to simplify the competition law infringement procedures and increase the cooperation between the Commission and NCAs.⁴⁰ The regime utilized specific cooperation mechanisms, such as information exchange and division of tasks, to improve the functioning of the network.⁴¹ The hypocoristic of the ECN+ Directive has its roots in this particular network, as it elaborates and clarifies the created cooperation mechanisms at a legally binding level.

After approximately a decade after the enactment of Regulation 1/2003, the Commission carried out an assessment of the functioning of Regulation 1/2003 between 2013 and 2014.⁴² Based on the assessment, the Commission published a 10-year communication on Regulation 1/2003 analysing the success of the modernized competition enforcement system.⁴³ The report sort of acted as a blueprint for the process toward the ECN+ Directive. The Commission acknowledged that NCAs are a central pillar of the enforcement system, and the competition enforcement system between the NCAs had converged.⁴⁴ In quantitative terms, between May 2004 and December 2013, approximately 85 percent of all investigated competition cases were investigated by the NCAs.⁴⁵ Although Regulation 1/2003 was seen as a success and the importance of NCAs was recognized by the Commission, it had significant shortcomings. Regulation 1/2003 did not contain any formal or minimum requirements for NCAs.⁴⁶ The communication indicated deficiencies in the resources and independence and the investigative and decisive powers of the NCAs.⁴⁷ It also

39 Cengiz, F. (2010). Multi-level governance in competition policy: The European Competition Network. *European Law Review*, 35(5), 661.

40 Cengiz, F. (2016), *supra nota* 32, 10.

41 Cengiz, F. (2016), *supra nota* 32, 11.

42 Sinclair, A. (2017). Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+). *Journal of European Competition Law & Practice*, 8 (10), 626.

43 European Commission (2014). Communication from the Commission to the European Parliament and the Council - *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM (2014) 453 final.

44 *Ibid.*, point 23-24.

45 *Ibid.*, point 8.

46 Potocnik-Manzouri, C. (2021). The ECN+ Directive: An Example of Decentralised Cooperation to Enforce Competition Law. *European Papers – A Journal on Law and Integration*, 2021(2). 991.

47 European Commission (2014), *supra nota* 43, point 39-40.

recommended that the rules on fines be clarified⁴⁸, and a joint leniency program should be created across Europe.⁴⁹ Despite the ECN and Regulation 1/2003, the guarantees for uniform resources and processes of NCAs lacked a legal basis at the EU level, leading to legal uncertainty caused by the differences in national laws. Without consistent regulation and mutual assistance between the MSs, the same competition cases could be solved differently depending on the MS in question. In the worst-case scenario, the gaps in the enforcement system could lead to the creation of so-called “safe harbors” where an undertaking has infringed competition law and is not subject to any enforcement measures due to the lack of uniform functioning of the NCAs.⁵⁰ To fill in these gaps, the ECN+ Directive was enacted.

1.2.3. Stage 3: The ECN+ Directive - a need to reform the decentralized system by strengthening the role of national competition authorities

The ECN+ Directive is the recent significant step for the competition law enforcement system because it complements the provisions of Regulation 1/2003 by clarifying the rules on the EU competition law enforcement of NCAs. It aims to answer the shortcomings of Regulation 1/2003 by strengthening and harmonizing the means and methods of NCAs to maximize the capacity of NCAs to intervene in infringements of Articles 101 and 102 TFEU and create an even more effective enforcement system.⁵¹ The main problem drivers which led to the adoption of the ECN+ Directive were a lack of effective competition tools and powers to impose deterrent fines, divergences between leniency programmes, and a lack of safeguards that NCAs can act independently and have adequate resources.⁵² Harmonizing the enforcement proceedings of the NCAs and ensuring that each MS’s NCA has a sufficient level of independence and resources enhances the objectives of the EU competition law and internal market. The ECN+ Directive is limited to competition control and therefore does not contain regulation on merger control.

Untapping the full potential of the competition law enforcement system benefits the EU as a whole. It was estimated that between 1985 and 2010, only around 20 percent of anticompetitive cartels were detected, leading to annual losses of approximately 181-320 billion euros.⁵³ The

48 European Commission (2014), *supra nota* 43, point 77.

49 European Commission (2014), *supra nota* 43, point 10.

50 Larhio, T., Vuorinen, J. (2018). ECN+ -Direktiivi tulee: mikä muuttuu? *Kilpailuoikeudellinen vuosikirja 2017*, 36.

51 Directive 2019/1, recital 8.

52 European Commission (2017). *Commission Staff Working Document: Impact Assessment*, COM (2017), 142 final. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017SC0114&from=EN>.

20 February 2022.

53 *Ibid.*

shortcomings in the system ultimately hit the ankle of consumers by creating unnaturally high retail prices and by narrowing the range of goods and services.⁵⁴ It may be presumed that it has been even profitable for undertakings to take anticompetitive actions. If restrictions on competition are detected effectively and deterrent fines are imposed, undertakings are not most likely to have as low a threshold for engaging in anticompetitive activities.

The ECN+ Directive consists of 6 main chapters, which are: 1) fundamental rights; 2) independence and resources; 3) powers; 4) fines and periodic penalty payments; and 5) mutual assistance.⁵⁵ Each of these chapters includes specific provisions that aim to improve and unify the enforcement system union-wide. The problems in the operations of NCAs vary from one MS to another, therefore not all provisions affect each MS similarly. However, the ultimate idea is to remove all these shortcomings in each MS, in order to create an even stronger network of competition law enforcers across the EU.

The ECN+ Directive itself did not change the enforcement procedure of the Commission. Yet, due to the increased powers of the NCAs, the workload and allocation of enforcement resources of the Commission will likely shift. The Commission does not need to solve competition cases that can be solved at a national level anymore. This results in the Commission having more resources to concentrate on more prominent competition cases such as massive cross-border cartels. This supports the objectives of the internal market by optimizing the functioning of the competition system. The next chapter will concentrate mainly on the role of the NCAs, but in addition, it will cursorily describe the role of the Commission in competition law enforcement.

⁵⁴ *Ibid.*

⁵⁵ Directive 2019/1.

2. THE DEVELOPMENT AND ROLE OF NATIONAL COMPETITION AUTHORITIES UNDER THE DECENTRALIZED SYSTEM OF ENFORCEMENT

The primary enforcers of EU competition law in a decentralized system are public actors: the Commission and the NCAs.⁵⁶ The Commission and the NCAs are in parallel responsible for the uniform application of the EU competition rules.⁵⁷ The previous Commission's role as the sole enforcer was not sufficient to ensure effective enforcement of EU competition law – the input of NCAs was highly needed.⁵⁸ Table 1 in the Appendix 1 illustrates the development process of parallel enforcement in a simplified manner by stating the main tasks and duties of both the Commission and NCAs under the three relevant stages analysed above. This chapter describes the role and significance of NCAs, and briefly explains how the enforcement powers are utilized.

After the adoption of Regulation 1/2003, NCAs became the main competition law enforcer in the EU.⁵⁹ Article 3 of the Regulation 1/2003 bound NCAs to apply Articles 101 and 102 TFEU to agreements or conduct capable of affecting trade between the MSs.⁶⁰ The idea behind this was to ensure that the EU competition rules were applied uniformly to all cases within the NCAs' scope. Although the role of NCAs in the EU competition law enforcement did not increase until 2004, their role in enforcing competition cases below the trade criteria has been nevertheless apparent. The Commission has occasionally observed national competition cases which do not affect trade between MSs because of the cases' precedent value.⁶¹ Such competition cases have strengthened the role of the EU law in the activities of NCAs before the ECN+ Directive.

The practical importance of the NCAs can also be demonstrated by national case law, for instance, by examining the considerable fines imposed at a national level. NCAs have imposed substantial fines on undertakings without the interference of the Commission. In 2014, French Competition Authority imposed a set of undertakings offering home care and personal care products for joint

56 Jones, A., Sufrin, B. (2011), *supra nota*, 28, 1026.

57 European Court of Auditors. (2020), *supra nota* 3, 8-9.

58 Regulation 1/2003, recital 3-4, 8.

59 Malinauskaite, J. (2020). *Harmonisation of EU Competition Law Enforcement*. Uxbridge, United Kingdom. Springer Nature Switzerland AG. 101.

60 Regulation 1/2003.

61 Judgement of the Court (Grand Chamber) of 7 December 2010, VEBIC, C-439/08, EU:C:2010:739.

price-fixing. The amount of the fine was nearly 1 billion euros.⁶² In Finland, one of the major competition cases was in 2014, when the Finnish Market Court (FMC), following the decision of the FCCA, imposed fines of 70 million euros on milk producer Valio for abusing its dominant market position.⁶³ The cases simply illustrate the fact that even before the adoption of the ECN+ Directive, NCAs had had a lot of practical relevance in the competition system and their presence should not be underestimated.

The Commission and NCAs should apply EU competition law uniformly also in order to ensure legal certainty: this means that cases are solved similarly whether the judgment was made at the national or international level.⁶⁴ The objective of uniform judgments in the EU has been confirmed in various case law derived from the ECJ. Already in the case of *Delimitis* in 1991, the ECJ held that the Commission and NCAs should refrain from taking conflicting decisions to promote a uniform application of EU competition rules.⁶⁵ However, it was impossible for the NCAs to enforce EU competition rules similarly to the Commission if they do not have similar premises.

To ensure effective parallel enforcement of Articles 101 and 102 to limit anti-competitive behavior to the maximum extent possible, it is necessary for both the Commission and NCAs to have adequate means and resources in all enforcement steps.⁶⁶ To understand the content of Table 1 more advantageously, the next sub-chapter explains the steps and possible actions of the enforcement process on a general level.

2.1. How is the EU competition law enforced in practice?

The enforcement process of Articles 101 and 102 begins when either the Commission or an NCA initiates an investigation either on its initiative or at the request or hint of an outside source.⁶⁷ To have an effective investigation, authorities are supplied with different investigation tools to determine whether there exists an anti-competitive practice. The authorities also have the right to

62 European Union. (2015). *French Competition Authority Imposes Fines of nearly € 1 Billion to Sanction Concerned Practices Between Home and Personal Care Products Manufacturers*, ECN Brief. Retrieved from: <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-competition-authority-imposes-fines-nearly-eu-1-billion-sanction-concerted-practices>. 5 March 2022.

63 Markkinaoikeus, MAO:467 & 468/14, 26.06.2014.

64 European Commission (2017), *supra nota* 52.

65 Judgement of the Court of 28 February 1991, *Delimitis*, C-234/89, EU:C:1991:91, point 47.

66 European Commission (2017), *supra nota* 52.

67 Oinonen, M. (2016). *EU:n ja Suomen kilpailuvalvonta*. Helsinki, Suomi: Talentum. 318.

prioritize their resources and decide not to investigate the matter.⁶⁸ However, inadmissibility may not be caused by the limited resources of NCAs. The ECN+ Directive addresses this possible concern in a way that restrictions on competition are not excluded from investigations for reasons related to resources.⁶⁹ During the investigation phase, the authorities may request information and interviews, and inspect business and other premises. Throughout the investigation phase, the Commission and NCAs may work with close cooperation either by demand or voluntarily.⁷⁰ The provisions of the ECN + Directive strengthen mutual assistance between the NCAs and between the Commission and the NCAs, especially during the investigation phase.⁷¹

After investigation, the authority determines whether there has been an infringement that requires further action.⁷² NCAs may state that there are no grounds for further action but the Commission has the exclusive right to conclude that there has not been an infringement of articles 101 or 102.⁷³ Granting the right for NCAs to take “negative” decisions could limit the powers of the Commission and impede the uniform application of competition law.⁷⁴

After finding an infringement, the authority may require an undertaking to terminate it.⁷⁵ If the matter is urgent and there exists a serious and irreparable risk for competition, the authority may order interim measures during an investigation to terminate the infringement temporarily.⁷⁶ The authorities may also make binding commitments for a specified period based on the offers of the undertakings – ordering commitments leads to the ending of the enforcement process.⁷⁷ In addition, the authority may impose either fines or periodic penalty payments to undertakings. An undertaking may be exempted from a fine in part or in full if it has, voluntarily and before investigations, revealed a secret cartel in which it has been involved. This practice is referred to as leniency.⁷⁸

Table 1 simply illustrates how the enforcement mechanisms of NCAs in applying Articles 101 and 102 TFEU have evolved considerably later than the Commission. It illustrates how the recent

68 Directive 2019/1 and Regulation 1/2003.

69 Malinauskaite (2020), *supra nota* 59, 123.

70 Oinonen, M. (2016), *supra nota* 67, 318–322.

71 Directive 2019/1, art. 27.

72 Whish, R., Bailey, D. (2021). *Competition Law* (10th ed.). Oxford, UK: Oxford University Press. 264-265.

73 Judgement of the Court of 3 May 2011, *Tele2Polska*, C-375-09, EU:C:2011:270, point 23.

74 *Ibid*, point 27-28.

75 Kuoppamäki, P. (2011). *Uusi kilpailuoikeus* (2nd ed.) Helsinki, Finland: Sanoma Pro. 65.

76 Whish, R., Bailey, D (2021), *supra nota* 72, 266-267.

77 Whish, R., Bailey, D (2021), *supra nota* 72, 267-268.

78 Malinauskaite (2020), *supra nota*, 59, 124–125. tät

ECN+ Directive complements these mechanisms to a sufficient level. The next chapter will analyze how the FCCA has evolved over time and how the ECN+ Directive contributes to the Finnish competition law system.

3. APPLICATION OF THE ECN+ DIRECTIVE IN FINLAND

Following the analysis of the development of the enforcement system and the discussion on the rationale for adopting ECN+ to improve the uniform operations of the NCAs, this chapter focuses on the implementation of the ECN+ Directive in Finland. The chapter will first interpret the background and current status of the Finnish competition law system and the development of the FCCA. Secondly, the chapter will determine how Regulation 1/2003 enhanced the competition law enforcement system in Finland and the conditions for implementing the ECN+ Directive. The chapter presents the views of two Finnish market players - a private law firm Roschier and the FCCA - on the conditions of the Finnish competition law system based on the Commission's public consultation answers before implementing the ECN+ Directive. The answers are loosely utilized to identify how the enforcement system and its weaknesses are seen differently by different actors and how factors outside the effectiveness should be considered. Finally, the chapter will assess the implementation of the ECN+ Directive, particularly concentrating on provisions of the powers and fines of NCAs. Provisions on powers and fines raised the most discussion and controversy concerning legal certainty and ultimately led to the most noteworthy changes to the Finnish Competition Act.

3.1. Background to the Finnish competition law system and competition authority

The modern Finnish competition law system can be considered to have commenced with the entry into force of the Act on Competition Restrictions⁷⁹ in 1988.⁸⁰ Simultaneously, the Finnish Competition Authority (the FCA) began its operations.⁸¹ Prior to the 1988 Act, cartels were practically permissible, and there existed a register maintained by authority from 1957 to 1992. The ultimate idea was that more harmful cartels could be avoided by allowing supervised cartels.⁸²

79 Laki kilpailunrajoituksista 29.07.1988/709.

80 However, laws concerning competition restrictions have existed in Finland already since the 1950s. Among other things, as early as 1957, the first Act on Cartels was enacted. At that time, however, the surveillance of the restrictions was purely national, and the focus was linked to the economic policies of the time. With the strengthening of European integration, Finland's competition policy gradually turned towards securing free market. Thus, the changes in the Finnish competition system were not indeed very rapid and radical, but influenced by the elements developed decades before 1988. *See*. Määttä, K., Reimavuo, S. (2015).

81 Määttä, K., Reimavuo, S. (2015). *Kilpailuvirasto kilpailupolitiikan suunnannäyttäjänä. Kilpailu- ja kuluttajaviraston selvityksiä 4/2015*. 23.

82 The root causes of such solutions are related to both Finland's history and geographical location. Especially after the insecurities caused by war times, working together in a small and remote state was considered primarily as a

Before long, the former approach to competition restrictions and legislation became ineffective. Hence, the throughout reform of competition legislation in 1988 was necessary. Admittedly, there were still pro-cartel features in the air after the reform. The application of competition law was primarily based on the principle of abuse which meant that competition infringements⁸³ could only be intervened if their effects were expressly provided for by law.⁸⁴ This principle thus gave undertakings an easy way to practice anti-competitive behavior, as minor modifications for otherwise prohibited actions could change them not to infringe the law expressly.⁸⁵

At that time, the powers of the FCA were yet rather limited⁸⁶ and the decisive authority was the Competition Council – which the FMC later replaced in 2002.⁸⁷ FCA's original task was to monitor compliance with the Act on Competition Restrictions to achieve a healthy and effective economic competition. The monitoring tasks included “examining the conditions of competition, determining restrictions on competition, taking measures to eliminate harmful effects of restrictions on competition, and taking initiatives to promote competition.”⁸⁸ If particular attention is paid to the wording “to eliminate harmful effects”, it can be noticed how the wording of the law itself reflected the former view taken that restrictions on competition (especially cartels) were not in themselves considered harmful – only their potentially harmful effects. The register remained maintained, and many cartels continued operating until 1992.⁸⁹ For instance, a manufacturer of industrial chemicals, Kemira Ltd, had a restrictive agreement on the competition with central stores in fertilizers for up to 30 years.⁹⁰ In literature, Finland has even been referred to as “a nation based on cartels”.⁹¹

The Act on Competition Restrictions was enacted already in 1992 which resulted in significant changes to the Finnish competition law system.⁹² The scope of what was constituted as a competition law infringement was enlarged and in control of cartels, the so-called principle of

positive aspect. The pro-cartel approach was not only a feature of the Finnish politics and legal system, but similar practices occurred elsewhere in Europe as well. *See*. Määttä, K., Reimavuo, S. (2015).

83 In 1988, the existing competition law infringements were limited merely to fixed prices and concerted bidding. Other means of cartels and abuse of a dominant market position were codified as competition law infringements with renewed law in 1992. *See*. Laki Kilpailunrajoituksista 29.07.1988/709.

84 Leivo, K., et al. (2012). *EU:n ja Suomen Kilpailuoikeus*. (2nd ed.) Suomi, Helsinki: Talentum. 1312.

85 *Ibid*, 1312.

86 *Ibid*, 1312.

87 *Ibid*, 1314.

88 Laki kilpailunrajoituksista 1988/709.

89 Hyytinen, A., et al (2018). Cartels uncovered. *American Economic Journal: Microeconomics*, 10 (4), 190.

90 Määttä, K., Reimavuo, S. (2015), *supra nota* 81, 26.

91 Markku Kuisma (2011) referenced in Hyytinen, A., et al (2018), *supra nota*, 84, 190.

92 Määttä, K., Reimavuo, S. (2015), *supra nota* 81, 28.

abuse was replaced with the principle of prohibition.⁹³ This resulted in the complete prohibition of cartels at the level of law.⁹⁴ Prohibition of cartels was a significant change in Finnish competition law. As a result, for example, an undertaking called Finnpap, which included nearly every undertaking in the Finnish paper industry and had been a major exporter, was terminated.⁹⁵ However, the FCA nevertheless gained the right to grant exemptions for cartels considered “acceptable”. The FCA granted such exemptions relatively actively between 1995 and 2004.⁹⁶

Another significant change took place in 2011 when the Finnish competition law system was reformed entirely with the enactment of the Competition Act.⁹⁷ The competition law system in Finland had evolved substantially from the environment in which it had started with the original act in the late 1980s. The new Competition Act clarified and modernized competition rules and harmonized them with EU legislation.⁹⁸ Among other things, the FCA was given the opportunity to prioritize its tasks, and conduct inspections and hearings.⁹⁹ Later in 2013, the FCA merged with the Finnish Consumer Authority¹⁰⁰ –right before the Commission’s 10-year communication.

Based on the above, it could be stated that Finland’s former, purely national competition law system was relatively permissive for restrictions on competition. Following the joining of the EU in 1995, the supranational competition legislation became directly applicable in Finland. Hence, the prohibitions in Articles 101 and 102 TFEU also came into force in Finland¹⁰¹, and the former permissive attitude towards anti-competitive practices was left in the past. Since then, the Finnish competition legislation has been regularly amended. For instance, the provisions on merger control were included in 1988¹⁰² and the FCA was given the right to disregard minor restrictions on competition.¹⁰³ Law renewals gradually led to the formation of the Finnish competition law system and the operations of the FCCA towards the initial state of the time of Regulation 1/2003. The

93 Leivo, K., et al. (2012) *supra nota*, 84, 1313.

94 Määttä, K., Reimavuo, S (2015), *supra nota* 81, 52–55.

95 Ylitalo, J. (2012). Kartelli oikeussalissa: sosiologinen näkökulma suomalaiseen kartelliin, *JYX Digital Repository*, 19.

96 Finnish Consumer and Competition Authority, Archive of Decisions. Retrieved from:

<https://arkisto.kkv.fi/ratkaisut-ja-julkaisut/staattinen-arkisto/poikkeuslupa-ja-puuttumattomuustodistusratkaisut/>. 10 March 2022.

97 Kilpailulaki 2011/948.

98 Leivo, K., et al. (2012), *supra nota* 84, 1316–1317.

99 Kilpailulaki 2011/948.

100 Määttä, K., Reimavuo, S. (2015), *supra nota* 81, 5.

101 Lindberg, R. (2018). Suomen kilpailulainsäädäntö 60 vuotta. *Defensor Legis* 6/2018, 923–924.

102 Carletti, E., et al. (2015). The economic impact of merger control legislation. *International Review of Law and Economics*, 42, 90.

103 Laki kilpailunrajoituksista annetun lain muuttamisesta 30.04.1998/303.

following chapters examine how Regulation 1/2003 and ECN+ Directive have contributed to the operations and development of the current competition policy pursued by the FCCA.

3.2. How the ECN+ reform enhanced Regulation 1/2003 in Finland

Regulation 1/2003 has arguably been the most substantial reform for the competition law enforcement system in Finland so far. It decentralized the enforcement of competition law within the EU, which led to the obligation of the FCCA to apply Articles 101 and 102 TFEU when the trade criterion is met, and the system of notification and exemption was terminated.¹⁰⁴ Before Regulation 1/2003, NCAs hardly applied European competition rules, as the powers of investigation and sanctions under national law were not available in cases that had an effect on trade between MSs.¹⁰⁵ As a result of the reform, the Finnish competition system took another step toward Europeanisation, as Regulation 1/2003 was based on substantive equivalence with EU law.

The relevant provisions provided by Regulation 1/2003 were included in the former Act on Competition Restrictions. According to the government's proposal, Finnish and EU competition policy had converged, and the proposal emphasized how Finnish enforcement practice had largely taken into account EU enforcement practice in purely national cases as well.¹⁰⁶ The majority of the amendments to the law were purely based on Regulation 1/2003.¹⁰⁷ Additional amendments not required by Regulation 1/2003 were justified, *inter alia*, by the opinions of the OECD and smooth co-operation within the ECN.¹⁰⁸ The objective of the law renewal was to modify Finnish legislation to correspond more to EU competition law and hence enhance uniformity.¹⁰⁹

The reform strengthened the role of the FCCA by making it the first instance of the authority of decision-making. The FCA was granted the right to make binding and formal decisions that could be appealed further to the FMC.¹¹⁰ The enforcement powers provided by Article 5 of Regulation 1/2003 – such as terminating the infringement, imposing interim measures, accepting

104. HE 11/2004 vp. Government's proposal to Parliament to amend the Finnish Act on Competition Restrictions (*Hallituksen esitys eduskunnalle laeiksi kilpailunrajoituksista annetun ja eräiden siihen liittyvien lakien muuttamisesta.*) 6-7.

105 *Ibid.*, 12.

106 *Ibid.*, 12.

107 *Ibid.*, 4.

108 *Ibid.*, 16.

109 *Ibid.*, 4.

110 *Ibid.*, 22-24.

commitments, and imposing sanctions – were conferred to the FCCA. The majority of these powers had existed in legislation but were applicable to merely national cases. Because Finnish legislation did not contain regulations on commitments¹¹¹ or withdrawal of the benefit provided by block exemptions¹¹², they were included in the power toolbox of the FCCA. At this stage, the possibility of imposing structural remedies was excluded from the renewal.¹¹³ Although Regulation 1/2003 did not conduct sanctions imposed by NCAs, Finland changed the sanctions imposed by the FCCA and introduced provisions on leniency practice to the law.¹¹⁴

The idea of the enforcement reform was to increase the efficiency of the enforcement of the EU competition rules by increasing the level of enforcement in MSs. In Finland between 2004 and 2015, in 14 cases the decision was based on the TFEU Articles instead of national legislation. Therefore, it can not be argued that the regulation triggered a sharp rise in international enforcement practice. Instead, the regulation strongly contributed to the Europeanisation of Finnish competition law and dropped the last remnants of the former competition policy.

3.2.1. Assessment of the need for changes before the ECN+ Directive

Finland's position on the Commission's 10-year communication was primarily positive.¹¹⁵ The Finnish Ministry of Economic Affairs and Employment notated on the Commission's 10-year communication by stating that Finland chiefly supports the minimum requirements to improve the enforcement system.¹¹⁶ It was tentatively assessed that the requirements were mostly fulfilled with the existing system in Finland, excluding certain details related to investigative and decision-making powers of the FCCA and the possibility to impose structural remedies.¹¹⁷

This chapter analyses the view taken on the functioning of the Finnish competition law enforcement system before the preparation of the ECN+ Directive based on the answers to the Commission's consultation. The extensive consultation by the Commission was publicly answered

111 *Ibid.*, 14, 40.

112 *Ibid.*, 41.

113 *Ibid.*, 14.

114 *Ibid.*, 24.

115 HE 210/2020 vp. Government's proposal to Parliament to amend the Finnish Competition Act (*Hallituksen esitys eduskunnalle laiksi kilpailulain muuttamisesta.*) 6.

116 Työ- ja Elinkeinoministeriö. E-letter 108/2014 vp. Retrieved from: https://www.eduskunta.fi/FI/vaski/Kirjelma/Documents/e_108+2014.pdf. 2 April 2022.

117 *Ibid.*

by, among others, the FCCA¹¹⁸ and a Finnish business law firm Roschier's EU and Competition team.¹¹⁹ This sub-chapter compares the responses of these two actors to reveal whether there were any deficiencies or disagreements in the enforcement system over the position expressed in the e-letter. Ultimately, it can be assessed loosely whether the system improvement demanded by the Commission in the communication was considered necessary in Finland.

Both respondents considered that the enforcement system of EU competition rules by NCAs was effective in general¹²⁰, but acknowledged the possibility for stronger actions to empower NCAs to be more effective enforcers.¹²¹ The responses were partly consistent concerning, *inter alia*, independence, resources, and leniency. Both respondents were aware of situations where the resources of NCAs had been insufficient, but neither was aware of issues caused by an inadequate level of independence despite the fact that at the time, only 10 NCAs were explicitly free from external influence.¹²² Roschier explicitly stated that there had been situations where the FCCA did not have sufficient resources to carry out its tasks and was particularly worried that it would hinder effective enforcement. According to Roschier, insufficient resources lead to “unreasonable investigative periods, inconsistent decision-making and changes in the case team which affect the quality of the FCCA's decisions.”¹²³

Based on the answers, the FCCA was more familiar with the issues regarding the enforcement tools of NCAs whereas Roschier highlighted the importance of transparency and accountability of the legal review in the decision-making practice. One issue which raised a particular amount of controversy was the possibility for the NCA to prioritize its cases. Where the FCCA underlined the importance of prioritization several times in its replies¹²⁴, Roschier expressed its concern that the FCCA might prioritize cases due to a lack of resources even in cases where further actions could be justified.¹²⁵ Moreover, Roschier's answers repeatedly reflected the need to ensure legal

118 The FCCA's answer (ID: b512d5a3-90db-435d-a6fc-5cff16d87754) to the Commission's Communication on Ten Years of Regulation 1/2003 of 9 July 2014 [COM(2014) 453]. Date 3 February 2016. Retrieved from: https://ec.europa.eu/competition-policy/public-consultations/2015-effective-enforcers_en#replies-to-the-consultation. 2 April 2022.

119 Roschier's answer (ID: 6be5c840-e52f-49a3-ae8d-13e2f91d6547) to the Commission's Communication on Ten Years of Regulation 1/2003 of 9 July 2014 [COM(2014) 453]. Date 5 February 2016. Retrieved from: https://ec.europa.eu/competition-policy/public-consultations/2015-effective-enforcers_en#replies-to-the-consultation. 2 April 2022.

120 *Ibid.*, 6.

121 *Ibid.*, 8.

122 European Commission (2017), *supra nota* 52, point 2.2.

123 Roschier's answer (2016), *supra nota* 119, 26.

124 The FCCA's answer (2016), *supra nota* 118, 7-70.

125 Roschier's answer (2016), *supra nota* 119, 13.

certainty and other safeguards as a counterbalance to the NCAs' enforcement powers. In addition to the above-mentioned matters, Roschier separately emphasized safeguarding the rights of defense of undertakings.¹²⁶

As regards fines, the FCCA recognized the issues concerning the amount and grounds of fines imposed on associations of undertakings.¹²⁷ Roschier stated that the lack of detailed rules on fines – at a general level and for the FCCA - leads to legal uncertainty for undertakings.¹²⁸ It can be read between the lines that the fining rules of the FCCA were considered too approximate. Also, an interesting difference was that Roschier considered that rules on fines should be based entirely on national rules¹²⁹, whereas the FCCA favored a combination of EU and national rules.¹³⁰

Although steady conclusions can not be drawn from these answers, they illustrate a basis for the emerging legal weighting between the principle of effectiveness and legal certainty in competition law. Roschier's answers reflected the interest of undertakings in having adequate legal safeguards against the improved enforcement powers. The FCCA's answers, on the other hand, reflected the same view taken by the Commission in its 10-year Communication that the reform is necessary. The matters considered in this sub-chapter support the view that the ECN+ reform was necessary for Finland as well. Finland's enforcement system was not as ideal as it was initially considered in the Parliament's e-letter. Although Finland had updated its competition laws regularly and followed the lead of the EU, the enforcement system still had certain gaps to be covered with the implementation of the ECN+ Directive. The following sub-chapter will first introduce the implementation process and needs in general. Subsequently, it will examine the implementation more closely about the most problematic areas of the implementation in terms of legal certainty – powers and fines.

126 *Ibid.*, 28.

127 The FCCA's answer (2016), *supra nota* 118, 33-53.

128 Roschier's answer (2016), *supra nota* 119, 35.

129 *Ibid.*, 48.

130 The FCCA's answer (2016), *supra nota* 118, 48.

3.3. Implementation of the ECN+ Directive in Finland

3.3.1. Overview of the implementation

The amendments followed by the ECN+ Directive entered into force late on the 24th of June 2021.¹³¹ Drafting of the implementation started in June 2019 after the Finnish Ministry of Economic Affairs and Employment set up a working group to write a report¹³², which underplayed the government proposal. The final government proposal was given on the 5th of November 2020,¹³³ however, the entry into force was delayed due to obstacles during the parliamentary process.¹³⁴

The amendments required by the ECN+ Directive left a relatively little national leeway. In Finland, the implementation was carried out in a way that the new enforcement provisions apply to the parallel enforcement of EU and national competition law or to independent application of either Articles 101 and 102 TFEU or national competition law. This implementation model was justified by the need to ensure uniform application and enhance the link between national and EU legislation.¹³⁵

The most significant legislative changes were related to the FCCA's investigation procedures, structural remedies, and fines for anti-competitive practices. These aspects raised the majority of questions and doubts during the preparation of the implementation process of the ECN+ Directive.¹³⁶ In addition to the amendments due to the implementation, certain purely national modifications were made to the Competition Act simultaneously with the implementation process.¹³⁷

131 Laki kilpailulain muuttamisesta 546/2021.

132 Työ- ja elinkeinoministeriö. (2019). Päätös työryhmän asettamisesta ECN+ direktiivin täytäntöönpanemiseksi. Retrieved from: https://api.hankeikkuna.fi/asiakirjat/6b5fe495-f505-4bf3-b0ed-a68ece6f21e3/c81cf073-d4e9-45e8-83e4-81ea7a62e315/ASETTAMISPAATOS_20200122070746.pdf. 17 March 2022.

133 Hallituksen esitys eduskunnalle laiksi kilpailulain muuttamisesta (HE 210/2020 vp).

134 Kauranen, S-A. (2021). Implementation of the ECN+ Directive in Finland: Delayed Implementation Finally Entered Into Force. *CoRe*, 5 (3), 248.

135 HE 210/2020 vp., *supra nota* 15, 5–8.

136 *Ibid*, 30-55.

137 The Finnish government decided to simultaneously reform the provisions concerning assessing the amount of penalty payments from purely national interests. See: Ministry of Economic Affairs and Employment. (2021). Competition Act amendments aimed at improving enforcement enter into force on 24 June. Retrieved from: <https://tem.fi/en/-/competition-act-amendments-aimed-at-improving-enforcement-enter-into-force-on-24-june>. 28.2.2022.

Some of the ECN+ Directive chapters – such as the chapters on fundamental rights and independence and resources - did not require any national legislative action.¹³⁸ Articles 4 and 5 of the ECN+ Directive guarantee the sufficient level of independence and resources of NCAs, which is a crucial part of the proper functioning of the enforcement system of competition rules. Article 4 ensures the independence of NCAs by safeguarding the impartiality and qualification of authorities, nonetheless without prejudice to cooperation between the ECN. Article 4 consists of 5 paragraphs that provide adequate security for the guarantees of independence. Article 5 regulates the level of financial, technical, and technological resources of NCAs on a general level.¹³⁹

The existing legislation in Finland met the requirements of independence set out in Article 4. Thus, no amendments were necessary to take regarding Article 4.¹⁴⁰ Whereas Article 5 goes, the FCCA was estimated to have sufficient, comprehensive resources to meet the minimum requirements of adequate resources of an NCA. Compliance with the provisions of Article 5 in Finland was ensured in the GP by examining economic factors such as budget funding and its rationale in detail. According to the GP, the FCCA has sufficient personnel and sufficient financial, technical, and technological resources. The security for technical and technological resources was not identified separately. However, enough attention has already been paid to the FCCA's resources, and therefore no special procedures were required.¹⁴¹

The existing Finnish legislation provided sufficient equivalents to the safeguards provided by Article 3 of the ECN+ Directive.¹⁴² The national equivalents for the rather general safeguards of Article 3 of the ECN+ Directive were already guaranteed in the Finnish Competition Act and other laws such as the Administrative Procedure Act and Act on the FCCA.¹⁴³ One problematic aspect of Article 3 is the second paragraph, which provides safeguards for the defense rights of undertakings. As the wording of the provision does not specifically identify what aspects are considered to belong under “rights of defense,” concerns were raised in Finland on whether undertakings are provided sufficient counterbalance to the rights granted to NCAs.¹⁴⁴ The lack of

138 HE 210/2020 vp., *supra nota* 115, 30-37.

139 Directive 2019/1.

140 HE 120/2020 vp., *supra nota* 115, 30–31.

141 HE 210/2020 vp., *supra nota* 115, 35–29.

142 HE 210/2020 vp., *supra nota* 115, 37.

143 HE 210/2020 vp., *supra nota* 115, 29-30.

144 See. Suomen Asianajaliitto (2020). *Lausunto kilpailulakityöryhmän mietintöön ECN+ Direktiivin täytäntöönpanemiseksi*. Retrieved from: <https://asianajaliitto.fi/2020/06/suomen-asianajaliiton-lausunto-kilpailulakityoryhman-mietintoon-ecn-direktiivin-taytantonpanemiseksi/>. 4 April 2022. / Elinkeinoelämän keskusliitto (2020). *Kilpailulain muuttaminen (ECN+ Direktiivi)*. Retrieved from: <https://ek.fi/lausunnot/kilpailulain-muuttaminen-ecn-direktiivi/>. 4 April 2022.

codification of the defense rights in the ECN+ Directive was considered particularly concerning in Finland as there is no clear and effective way to complain about a situation where the FCCA has acted over its competence.¹⁴⁵ Despite the criticism, the legislator considered that the defense rights of undertakings are protected adequately by the Constitution of Finland¹⁴⁶ and the Act on Administrative Procedure¹⁴⁷. Therefore, it was not necessary to amend the Finnish legislation at all regarding Article 3.¹⁴⁸

Before ECN+ Directive, regulations on leniency were based on ECN's Model Leniency Programme in Finland. Finnish competition law was essentially in line with the obligations under Articles 17 to 23 of the ECN+ Directive.¹⁴⁹ However, unlike other parts of the ECN+ Directive, the provisions on leniency are fully harmonized in nature, which means that they can not be derogated from national legislation. Therefore, it was necessary to clarify several leniency rules to reflect the details of the ECN+ Directive fully. However, the provisions on leniency are detailed to the extent that they would require extensive analysis. Thus, further research on leniency is excluded from the thesis. The following sub-chapters shall concentrate on the two main amendments to the Finnish competition law system.

3.3.2. Implementation of the provisions on powers

The ECN+ Directive contains provisions on the minimum requirements for the effective enforcement of Articles 101 and 102 TFEU regarding the investigative and decisive powers of NCAs. Articles 6-12 of the ECN+ Directive include the minimum powers which are: 1) power to inspect business premises; 2) power to inspect other premises; 3) request for information; 4) interviews; 5) finding and termination of an infringement; 6) interim measures; and 7) commitments.¹⁵⁰ Some of the provisions provide NCAs with powerful means to intervene in the activities of undertakings or associations. A notably drastic measure is the imposition of structural remedies, which can ultimately lead to the division of an undertaking into parts.

Implementing the provisions on extended investigative and decisive powers of the NCAs raised critical discussion on Finland amongst legal professionals. Some of the provisions did not require

145 Aalto-Setälä, I. (2020). ECN+ -Direktiivin Täytäntöönpano ja Puolustamisoikeudet. *Defensor Legis*, N:o 4/2020, 526.

146 Suomen Perustuslaki 11.06.1999/731, section. 2.

147 Hallintolaki 06.06.2003/434, section 34.

148 HE 210/2020 vp., *supra nota* 115, 29–30.

149 HE 210/20 vp., *supra nota* 115, 45-51.

150 Directive 2019/1.

any amendments to Finnish legislation, whereas some led to relatively radical changes. The most drastic changes raised a debate on whether there exist sufficient legal safeguards for undertakings and associations in Finland to balance the extended toolbox of powers of the FCCA.¹⁵¹ This sub-chapter presents the amendments to the Finnish Competition Act with the order of each provision introduced above and whether the implementation solution raised any discussion on whether it can be considered successful or not.

Powers to inspect business premises and other premises

Articles 6 and 7 of the ECN+ Directive require NCAs to have powers to inspect business premises or other premises. The inspection powers of the officials of the FCCA are regulated in Sections 35 and 36 of the Finnish Competition Act.¹⁵² Section 35 was modified to cover all the necessary tools of inspections set out in Article 6, and thus cover a wider scope than before. To inspect other premises, Competition Act previously required that to inspect other premises, the FCCA must have a suspicion of a serious infringement of competition. The ECN+ Directive does not impose such a condition of serious infringement, i.e. Finnish competition law had imposed stricter requirements. Hence, the wording of 36§ was modified to comply with Article 7 of the ECN+ Directive and the requirement of a serious infringement was removed from the law. As a result, it will be easier for the FCCA to carry out inspections on other premises.¹⁵³ According to the preamble of the ECN+ Directive, the NCA must demonstrate, under the case-law of the ECJ, that there are reasonable grounds for suspecting an infringement of Articles 101 or 102 TFEU.¹⁵⁴ The wording of the Finnish Competition Act does not expressly require a statement of reasoning.¹⁵⁵ According to the GP, in practice, the FCCA's inspections are always reasonably justified. With regard to inspections of other premises, the FCCA must be granted a separate permit from the FMC. These safeguards were considered adequate, and the risk of misuse of powers in inspections is considered low.¹⁵⁶

151 Suomen Asianajajaliitto (2020), *supra nota* 144. Elinkeinoelämän keskusliitto (2020), *supra nota* 144.

152 HE 210/2020 vp, *supra nota* 115, 38.

153 *Ibid.*, 37-39, 69.

154 Directive 2019/1, recital 31.

155 Kilpailulaki 1999/731, section 36.

156 HE 210/2020 vp, *supra nota* 115, 37–39. Ilkka Aalto-Setälä (2020), *supra nota* 145, 533.

Requests for information and interviews

According to Article 8 of the ECN+ Directive, NCAs shall have the right to request information from undertakings or associations of undertakings for the application of competition rules under certain limits. Section 33 of the Finnish Competition Act complied explicitly with the meaning of Article 8. Hence, national amendments were not necessary.¹⁵⁷

Article 9 of the ECN+ Directive ensures all MSs' NCAs have the right to interview any actors who may possess relevant information for the application of Articles 101 and 102 TFEU.¹⁵⁸ The Provisions on interviews are regulated in 34§ of the Competition Act. Finnish legislation set stricter conditions for interviews than the ECN+ Directive, as the scope of actors and the conditions to interview were narrower. It was, therefore, necessary to amend the Competition Act to be in line with the content of the ECN+ Directive.¹⁵⁹

Concerning interviews, the actions of the FCCA have been occasionally considered problematic in previous cases even before the implementation of the ECN+ Directive. In a so-called bus cartel case, the FCCA had gained access to documents that were later found to be covered by of legal professional privilege by the Finnish Supreme Administrative Court. Consequently, the use of these documents as evidence was rejected.¹⁶⁰ Although the case itself has been praised for having publicly raised the demarcation of information within the legal community¹⁶¹, it nevertheless raises questions concerning the rights of defense of undertakings and legal certainty. In the present case, the undertaking under the investigation did not have any access to complain about the FCCA's maladministration during the proceedings.¹⁶² The fact that the mistake made by the FCCA was briefly stated and bypassed despite the harm it may have caused to the undertakings, implies injustice.

In the past, the FCCA has also taken over strong measures during interviews lacking a clear legal basis. For instance, previously the right to record hearings during the investigation process was

157 HE 210/2020 vp., *supra nota* 115, 39.

158 Directive 2019/1, art. 9.

159 HE 210/2020 vp, *supra nota* 115, 39-40, 59-60.

160 Korkein Hallinto-Oikeus, KHO:2019:98, 20.08.2019.

161 See. Johanna Lähde (2019). *Asianajosalaisuus saa vahvistusta uudesta oikeuskäytännöstä*. Retrieved from: <https://www.castren.fi/fi/blogijauutiset/uutiset-2019/asianajosalaisuus-saa-vahvistusta-uudesta-oikeuskaytannosta/>. 10 April 2022.

162 KHO:2019:98, *supra nota* 160.

limited to the FCCA's authorities, excluding the right to record from the attorney of the undertaking under investigation. The Finnish Bar Association raised this issue in public¹⁶³, on which the Deputy Chancellor of Justice later expressed his view and found the rule to lack a legal basis.¹⁶⁴

With regard to the interviews, it might be questioned that despite the fact that their introduction was facilitated and that the powers of the FCCA were extended, the legal security guarantees of undertakings under investigation were not improved at the legislative level. Given that the previous exceedances of competence and illicit rules by the FCCA have been made public, it can be wished for that the FCCA will be more precise in the future in terms of remaining within its competence and that similar issues would not be encountered in the future anymore.

Finding and terminating an infringement

Article 10 of the ECN+ Directive led to significant amendments to the Competition Act. The former 9§ of the Competition Act, which dealt with terminating an infringement, was substituted with utterly new content.¹⁶⁵ Competition Act did not contain any explicit provisions on the FCCA's power to find an infringement. Thus, the right to find an infringement - also retroactively - was included in 9§.¹⁶⁶ In addition, FCCA couldn't impose structural remedies before, and the possibility to do so has been strongly criticized in Finland.¹⁶⁷ Structural remedies were implemented to a completely new section 9a which is regulated in more detail than Article 10 of the ECN+ Directive. The introduction of structural remedies is restricted to ensure the legal security of the subject, inter alia, by offering the subject an opportunity to appeal directly to the Finnish Supreme Administrative Court.¹⁶⁸

However, the explicit content of structural remedies is not specified in the ECN+ Directive or in the Finnish Competition Act.¹⁶⁹ As it is a very severe measure that, at its strongest, could lead to

163 Apulaisoikeuskanslerin päätös (OKV/3/10/2020). *Asianajajan oikeus äänittää kuulemis- ja tarkastustilanne*. 1–4.

164 *Ibid.*, 4–5.

165 HE 210/20, *supra nota* 115, 57-58.

166 *Ibid.*

167 *See*. Ilkka Aalto-Setälä (2020), *supra nota* 145, 536-537. Perustuslakivaliokunnan lausunto, PeVL 8/2021 vp. point 5 and 6. Retrieved from: https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/PeVL_8+2021.aspx. 12 April 2022.

168 Kilpailulaki 948/2011, section 9a.

169 Directive 2019/1 and Kilpailulaki 948/2011.

the splitting of an undertaking, it could be advisable to clarify the content of structural remedies and the conditions for imposing them better.

Interim measures and commitments

Provisions on interim measures are laid down in 45§ of the Competition Act which was modified to reflect the meaning of Article 11 of the ECN+ Directive. Due to the implementation, a prerequisite was included to 45§ that in order to issue interim measures, there must be an immediate presuppose to the exception that the conduct subject is considered to cause serious and irreversible harm to competition.¹⁷⁰

A major legislative change concerned the deadlines of interim measures. In practice, there used to be a time limit in Finland for interim measures ordered by the FCCA. This was seen as problematic because it practically prevented the use of interim measures and thus weakened the monitoring powers of the FCCA. The FCCA was required to make a decision on the matter and submit a proposal to the FMC to impose a fine within 90 days after the ordering of interim measures being made. If the deadline of 90 days was not met, the interim measure would expire and the risk of a serious infringement of competition would return in force.¹⁷¹ Given that procedures for detecting and resolving competition infringements may take years, the deadline was certainly limiting efficiency. Perhaps that was the reason behind the fact that interim measures have never been issued in Finland heretofore.

Hence, it was necessary to amend the rules on validity so that interim measures are valid until the decision on the relevant matter is made or for a fixed period determined by the FCCA. Also, the rules on appeals against interim measures were modified to comply with the provisions of the ECN+ Directive.¹⁷² The ECN+ Directive requires that “interim measures can be reviewed in expedited appeal procedures.”¹⁷³

Amendments to the validity of interim measures mean that the FMC will have to deal with the changes as urgent matters in the future. Finnish lawyer Ilkka Aalto-Setälä raised his concerns on

170 HE 210/20, *supra nota* 115, 41 and 64-67.

171 *Ibid.*, 41.

172 *Ibid.*, 64-67.

173 Directive 2019/1.

whether the FCCA will have the opportunity to ban the procedure without a thorough investigation and stated that there are risks related to the defense rights in the matter.¹⁷⁴ As conditions for ordering interim measures have now been strengthened, the use of interim measures might become a more common practice. The use of interim measures has also been revived at the EU level in recent years, with the introduction of the measure by the Commission in the case of *Broadcom* after an 18-year hiatus.¹⁷⁵ The future will show whether the imposition of interim measures will become a trend at the EU level and whether Finland will follow the possible Commission's example. If interim measures become a more common practice, it might be desirable to specify the procedure and strengthen other counterbalances associated with the tool.

Regarding commitments, the Competition Act was clarified with relatively minor amendments to comply further with Article 12 of the ECN+ Directive. For instance, the Competition Act did not provide the possibility for the FCCA to impose commitment decisions for a limited period or require the FCCA to consult market participants before deciding on commitment. As required by the ECN+ Directive, the law also included a requirement that, in a case of a commitment decision, further actions for an infringement must be declared unnecessary.¹⁷⁶ The next sub-chapter focuses on the implementation of the provisions on fines, as it also concerned certain scenarios alarming for legal certainty.

3.3.2. Implementation of the provisions on fines

In order to guarantee effective enforcement of Article 101 and 102 TFEU throughout the EU, NCAs must be equipped with the power to impose fines on undertakings and associations which are effective, proportionate, and dissuasive.¹⁷⁷ The ECN+ Directive resulted in a number of amendments to the Competition Act concerning the fines imposed on undertakings and associations for infringing competition law. ECN+ Directive brought two particularly significant changes to the Finnish competition law system: fines for breach of the procedural rules provided by the ECN+ Directive and collection of fines imposed on associations.¹⁷⁸ These amendments are particularly examined in this chapter due to the concern they caused to rights of defense of undertakings and legal certainty in Finland.

174 Ilkka Aalto-Setälä (2020), *supra nota* 145, 554-553.

175 Order of the Court of 15 December 2020, *Broadcom*, T-876/19, EU:T:2020:650.

176 Kilpailulaki 948/2011, section 10.

177 Directive 2019/1, recital 40.

178 Valiokunnan lausunto PeVL 8/202 vp. HE 210/2020 vp. Recitals 6–8 and 12-21. Retrieved from: https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/PeVL_8+2021.aspx, 25.04.2022

The provisions of the ECN+ Directive extended the power of the FCCA to impose fines. Under Article 13(2) of the ECN+ Directive, MSs must be able to impose fines on undertakings or associations thereof which are “effective, proportionate, and dissuasive”.¹⁷⁹ Before the implementation, in Finland, undertakings could only be fined for infringements of Articles 101 and 102 TFEU – or equivalent national provisions of the Finnish Competition Act.¹⁸⁰ As a result of the implementation, the imposition of fines extended to non-compliance with certain proceedings and decisions listed in Article 13(2) of the ECN+ Directive, such as refusing an inspection, breaking seals, providing incorrect or misleading information, or failing to comply with interim measures or commitments.¹⁸¹ In Finland, the amount of fine to be imposed for an infringement is determined by the FMC¹⁸², which assesses the amount of the fine on the basis of intent or negligence.¹⁸³ The maximum amount of the fine shall be ten percent of the total worldwide turnover of the undertaking or an association thereof.¹⁸⁴

There is a significant risk for undertakings’ rights of defense related to these extended fining powers. If the FCCA requests disclosure of material under the legal professional privilege, and the undertaking or association refuses to disclose it, the FCCA is practically entitled to submit a fine to the FMC based on refusal. In that scenario, the material must be disclosed, and an appeal may be lodged only in the main proceedings when the material covered by legal professional privilege has most likely already been disclosed.¹⁸⁵ In Finland, there have already been issues in situations concerned with the material covered by legal professional privilege when the FCCA has unjustifiedly extended its powers to non-disclosure material. In the so-called bus cartel case, the FCCA had demanded access to material covered by legal professional privilege. The error became apparent in the proceedings held by the Supreme Administrative Court, which merely ruled that the concerned material should not have been taken into account and therefore was disregarded.

The second significant reform to the Finnish competition law enforcement system with the implementation was the consideration of the turnover of members undertakings of associations in determining the number of fines to be imposed on associations and the grading system of fines. The changes in the amount of fines imposed on associations were significant because it was a big

179 Directive 2019/1.

180 HE 210/20, *supra nota* 115, 43.

181 Directive 2019/1.

182 Kilpailulaki 948/2011, section 12.

183 HE 210/20, *supra nota* 115, 60.

184 Kilpailulaki 948/2011, section 13a.

185 Ilkka Aalto-Setälä (2020), *supra nota* 145, 531-532.

improvement in the usage of resources. When members of an association of undertakings are fined simultaneously, it is adequate for the FCCA to open only one proceeding only against the association, not individually against each of the member undertakings. This results in less effort having a more significant impact – thus supporting the traditional economic theory and efficient allocation of resources in the internal market.

Before the ECN+ Directive, fines imposed on associations were calculated solely based on the association's worldwide turnover – turnover of the member undertakings was not taken into account.¹⁸⁶ In practice, turnover of associations consists merely of membership fees, leaving the fines imposed on associations minor and lacking the deterrent effect.¹⁸⁷ As a result of the regulation, it may even have been considered profitable to practice anticompetitive behavior as an association since the fine imposed on the association in terms of turnover would not be as significant as a fine imposed on an individual undertaking. In that scenario, the individual undertakings are partially relieved of their liability because the association bears the fine.

As a result of the ECN+ Directive, fines imposed on associations must consider the worldwide turnover of its member undertakings and, if the association is insolvent, be paid jointly by the member undertakings' contributions.¹⁸⁸ If the fine is not paid in full by the contributions, NCA may demand payment directly from any undertaking whose representatives were members of the decision-making body of the association, such as the CEO or members of the board. After that, payment may even be claimed from any member undertaking operating in the market where the competition infringement occurred. As a limitation to these rather strict grading rules, payment shall not be levied on a member undertaking unaware of or withdrew from an infringement before initiating an investigation by NCA. As the Finnish Competition Act did not contain any provisions on the matters mentioned above, the content of the ECN+ Directive in these respects was added to §13b (2) and §47a of the Finnish Competition Act.¹⁸⁹

There exists a major risk of undertakings' rights of defense being infringed. If the FCCA imposes a fine on an association that is insolvent, the member undertakings responsible for the payment have virtually no opportunity to defend themselves against competition case in the FMC. As the

186 HE 210/20, *supra nota* 115, 44.

187 Bruneckiene, J., & Pekarskiene, I. (2015). Economic efficiency of fines imposed on cartels. *Engineering Economics*, 26(1). 58.

188 Kilpailulaki 948/2011, section 47a.

189 HE 210/20, *supra nota* 115, 44.

Finnish legislation does not provide an opportunity for the intervention of a third party in competition cases, the undertaking concerned may only appeal against the fining decision separately. There is a risk that the final decision on the original infringement of the association has already been made, and the requirement of payment is final. In that case, the undertakings would ultimately become a payer despite the separate appeal.

The issues with amended fining powers in relation to the rights of defense of undertakings significantly undermine legal certainty. Although ensuring legal certainty undermines the full effectiveness of the competition law system, it can not be completely ignored. Penalties for an infringement must always have a clear legal basis and the proceedings must be fair. In the future, the FCCA will have to take greater account of factors that limit the principle of effectiveness when imposing fines, in particular, because these factors are recorded insufficiently at the level of law.

CONCLUSION

The thesis aimed to examine the development of the European competition law enforcement system and the implementation of the ECN+ Directive in Finland and determine whether and how the implementation model of the ECN+ Directive in Finland can contribute to the Directive's objective and impact the enforcement of EU competition rules. To discover the answer to this key research question, the thesis assessed the underlying reasons for the Finnish legislative solutions concerning the implementation and considered the strengths and weaknesses of the national system from the perspective of the functioning of the internal market. The interpretation of these questions required an examination of the enforcement system from the point of view of effectiveness and the principle of legal certainty.

Based on the analysis of the development of the competition law enforcement system in both the EU and Finland and the Finnish implementation model, the thesis concludes that Finland can contribute to the objective of the ECN+ Directive and therefore enhance the enforcement of Articles 101 and 102 TFEU. Finland has adequately implemented the provisions of the ECN+ Directive in its existing competition legislation, thus fulfilling its role in eliminating inequalities between NCAs. The implementation solutions indicate that Finland is willing to contribute to the effective enforcement and strengthen and unify the operations of the FCCA towards other MSs and the Commission.

Regarding the underlying reasons for the selected particular legislative solutions to comply with the ECN+ Directive, Finland's implementation model continued the Finnish relatively strict line of competition law. Therefore, it was not surprising that all of the FCCA's enforcement methods were introduced to the law to the farthest extent possible. At the regulatory level, Finnish competition policy could be considered to have been at the forefront at the EU level in recent years, as Finnish competition law has included modern regulations on, among other things, inspections of digital forms before the implementation of the ECN+ Directive. Additionally, the independence and resources of the FCCA have been adequate before the requirement imposed by the EU. The framework for effective enforcement of EU competition law certainly exists in Finland. Nevertheless, the Finnish enforcement system lacks proper structural and legal safeguards that would ensure a sufficient counterbalance to the means of the jurisdiction justified by the principle of effectiveness. Despite the criticism, specific amendments to Finnish legislation were not made in the implementation process of the ECN+ Directive to ensure legal certainty for undertakings

subject to the jurisdiction. However, the ECN+ Directive significantly weakens the legal position of undertakings in the investigation and enforcement phase.

The question whether the improved powers and acquirements conferred on NCAs based on the principle of effectiveness are proportionate compared to the securing of legal certainty remains open. Regarding Finland, the implementation of the provisions concerning the reformed powers and fining of the FCCA reveal the gaps in the enforcement system. While in the last 20 years, the need for reform has revolved around the principle of effectiveness, in the future, the concentration could shift to emphasizing legal certainty, especially including the rights of defense of undertakings. From the perspective of the Finnish competition system, the concerns in the enforcement system stem from national competition policy and the past activities of the FCCA rather than directly from the ECN+ Directive itself. However, it should be noted that the ECN+ Directive provides an even more robust framework for an effective competition policy, which may occasionally lead to the disregard of other significant legal principles in Finland – and possibly in other MSs as well.

Given the timeframe, the objectives of the ECN+ Directive can be estimated to have been successful but raised new concerns concerning justice. As the ECN+ Directive was implemented in Finland less than a year ago, the case law has not yet developed to the level where the potential challenges imposed by the Directive can be clearly distinguished by the case law. However, the possible future challenges are explained more by Finland's competition policy itself than by the changes brought by the implementation. It is therefore a pity that it was not seen as necessary to specify legal protection guarantees at the level of enacting the law at the level of either EU or Finnish law. Only the future will show how this third stage of competition law enforcement will evolve, but the thesis certainly notices danger signs. If the practice emphasizing the principle of efficiency is brought to an ideal level in both the EU and Finland, perhaps in the future more attention will be paid to the legal principles that secure the objects of enforcement.

Too precise regulation could, in the worst case, have the opposite effect on the economy than the current legislation seeks to achieve. In extreme circumstances, undertakings may relocate to places where they have the opportunity to operate more freely. However, it should be noted that this is an extreme situation, and generally the changes brought by the ECN+ Directive can be considered positive. After all, the primary objective is to prevent anti-competitive behavior, and before the ECN+ Directive, the competition law enforcement system was unsuccessful. Despite its

weaknesses, the ECN+ Directive is a necessary improvement to the EU's and Finland's competition law enforcement system. It will certainly benefit the internal market's better functioning in the future and, therefore, benefit the MSs as well.

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APPENDICES

Appendix 1.

Table 1.

Investigation	Before 2004	After Adoption of 1/2003	ECN+
Commission	<p>Examine and take copies of books and business records.</p> <p>Ask for oral explanations.</p> <p>Inspect any undertakings' premises.</p> <p>Request information.</p> <p>Interview.</p>	<p>Do all necessary inspections on business premises: for instance, examine records in any forms, seal premises, and records.</p> <p>Inspect other premises.</p> <p>Request information.</p> <p>Interview.</p>	-
NCA's	<p>Undertake investigations which the Commission considers necessary.</p>	<p>Inspect according to national law on behalf and for the account of other authorities.</p> <p>Request the Commission to hear natural or legal persons.</p>	<p>Do all necessary inspections on business premises: for instance, examine records in any forms and seal premises and records.</p> <p>Inspect other premises.</p> <p>Request information.</p> <p>Interview the parties and others that may have relevant information.</p>

Adjudication	Before 2004	After Adoption of 1/2003	ECN+
Commission	<p>Apply Articles 101(1) and 102 TFEU.</p> <p>Certify negative clearances.</p> <p>Find and terminate infringements.</p> <p>Declare</p>	<p>Apply Articles 101(1) and 102 TFEU.</p> <p>Find and terminate infringements.</p> <p>Impose behavioral or structural remedies.</p>	-

	whether Article 101(1) is not applicable pursuant to Article 101(3) TFEU.	Find inapplicability.	
NCA's	Apply Articles 101(1) and 102 TFEU if Commission has not initiated any proceedings. Make application to Commission to terminate infringement.	Apply Articles 101(1) and 102 TFEU in cases that may affect trade within the internal market. Require that an infringement will be terminated. Prioritize if there are no grounds for action.	Apply Articles 101(1) and 102 TFEU in cases that may affect trade within the internal market. Find and terminate infringements. Impose behavioral or structural remedies.

Penalties of an infringement	Before 2004	After Adoption of 1/2003	ECN+
Commission	Impose fines or periodic penalty payments.	Impose fines or periodic penalty payments.	-
NCA's	-	Impose fines, periodic penalty payments or other penalties provided in national law.	Impose fines and/or periodic penalty payments Have a leniency programme.

Commitment decisions and settlements	Before 2004	After Adoption of 1/2003	ECN+
Commission	-	Order interim measures. Make commitments.	-
NCA's	-	Order interim measures. Make commitments.	Order interim measures. Make commitments.

(References: Council Regulation (EEC) No 17 of 6 February 1962. Council Regulation (EC) No 1/2003 of 16 December 2002. Directive (EU) 2019/1.)

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